THE GENERAL STATUTES OF NORTH CAROLINA

1981 CUMULATIVE SUPPLEMENT

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of
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Volume 2A

1976 Replacement

Annotated through 302 N.C. 222 and 50 N.C. App. 567. For complete scope of annotations, see scope of volume page.

Place in Pocket of Corresponding Volume of Main Set. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Supplement to Replacement Volume 2A contains the general laws of a permanent nature enacted by the General Assembly at the first and second 1977 and 1979 Sessions and the 1981 Session through October 10, 1981, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show all sections except catchlines carried for the purpose of notes only. An index to all statutes codified herein will appear in Replacement Volumes 4B and 4C.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the general laws enacted by the General Assembly at the first and second 1977 and 1979 Sessions and the 1981 Session through October 10, 1981, affecting Chapters 28A through 52A of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through volume 302, p. 222.
North Carolina Court of Appeals Reports through volume 50, p. 567.
Federal Reporter 2nd Series through volume 650, p. 292.
Federal Supplement through volume 515, p. 55.
Federal Rules Decisions through volume 89, p. 719.
Bankruptcy Reporter through volume 11, p. 138.
United States Reports through volume 449, p. 410.
Supreme Court Reporter through volume 101, p. 2881.
North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

The General Statutes of North Carolina
1981 Cumulative Supplement

VOLUME 2A

Chapter 28A.

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ARTICLE 1.

Definitions and Other General Provisions.

§ 28A-1-1. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Collector" means any person authorized to take possession, custody, or control of the personal property of the decedent for the purpose of executing the duties outlined in G.S. 28A-11-3.

(1a) "Devisee" means any person entitled to take real or personal property under the provisions of a valid, probated will.

(2) "Foreign personal representative" means a personal representative appointed in another jurisdiction, including a personal representative appointed in another country.

(3) "Heir" means any person entitled to take real or personal property upon intestacy under the provisions of Chapter 29 of the General Statutes.

(4) "Mortgage" includes a deed of trust.

(5) "Personal representative" includes both an executor and an administrator, but does not include a collector.

(6) "Service" means delivery of the citation, summons, notice or other civil process to the person to be served by an officer authorized to serve process and, if such service cannot be obtained, then by the mailing of the citation, summons, notice or other civil process by certified mail, return receipt requested, to the last known address of the person to be served. (1973, c. 1329, s. 3; 1981, c. 955, s. 4.)

Effect of Amendments. — The 1981 amendment added present subdivision (1) and redesignated former subdivision (1) as (1a).

§ 28A-1-2: Repealed by Session Laws 1979, c. 88, s. 2.

Cross References. — As to the abolishment of the doctrine of worthier title, see § 41-6.2.

ARTICLE 2.

Jurisdiction for Probate of Wills and Administration of Estates of Decedents.

§ 28A-2-1. Clerk of superior court.

Legal Periodicals. — For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

CASE NOTES

Allocation of Jurisdiction between Clerk and Judge. — Section 7A-241 does not say that concurrent jurisdiction in probate matters is vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested in the superior court division to be exercised by the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, has allocated the jurisdiction between the clerk and the judge. By this section the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act under § 28A-2-3. When the clerk is disqualified to exercise his jurisdiction, the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate court pursuant to § 7A-251. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Jurisdiction Exclusive. —

Sections 28A-2-1 through 28A-2-3 of Chapter 28A, as did the former law, vest in the clerk of superior court exclusive jurisdiction of the probate of wills, administration, settlement and distribution of the decedents' estates, the granting of letters, testamentary and of administration, or other letters of authority. Unlike the former law, the jurisdiction of the clerk is no longer limited by such considerations as where the decedent died, left property or was domiciled. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Except for situations in which the clerk is disqualified to act, § 28A-2-3, the clerk's probate jurisdiction is original and exclusive, and a superior court judge may hear such cases only upon appeal from the clerk. Beck v. Beck, 36 N.C. App. 774, 245 S.E.2d 199 (1978).

In this State, the clerk is given exclusive original jurisdiction of the administration, settlement and distribution of estates except in cases where the clerk is disqualified to act. In re Estate of Snipes, 45 N.C. App. 79, 262 S.E.2d 292 (1980).

The right, time and manner, and effect of the filing and recording of a dissent to a will are all matters within the probate jurisdiction of the clerk. In re Estate of Snipes, 45 N.C. App. 79, 262 S.E.2d 292 (1980).

§ 28A-2-3. Jurisdiction where clerk interested.

CASE NOTES

Stated in In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Cited in Beck v. Beck, 36 N.C. App. 774, 245 S.E.2d 199 (1978).

ARTICLE 3.

Venue for Probate of Wills and Administration of Estates of Decedents.

§ 28A-3-1. Proper county.

CASE NOTES

Cited in In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

ARTICLE 4.

Qualification and Disqualification for Letters Testamentary and Letters of Administration.

§ 28A-4-1. Order of persons qualified to serve.

CASE NOTES

Cited in Baer v. Davis, 47 N.C. App. 581, 267 S.E.2d 581 (1980).

§ 28A-4-2. Persons disqualified to serve as personal representative.

CASE NOTES

A testator has the right to name the person who shall administer his estate after his death, provided his designate is not disqualified by law. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

The person testator names as executor has the right to administer the estate. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

And he can be deprived of that right only by his refusal or neglect to probate the will or to take out letters, or by his inability or unsuitableness to execute the trust. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Statutory specifications of disqualifications for service as a personal representative cannot be superseded by the broad general policy of the law which gives effect to the desires of a testator and sees that his intentions are carried out so far as they can be ascertained. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Personal Interests Antagonistic to Estate as Grounds for Disqualification. — When it appears that the personal interests of the prospective executor are so antagonistic to the interests of the estate and those entitled to its distribution that the same person cannot fairly represent both, the testator's nominee is unsuitable and disqualified as a matter of law. This is especially true where the conflict is one which the testator did not know or foresee. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Stated in Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980).

ARTICLE 5.

Renunciation by Personal Representative.

§ 28A-5-1. Renunciation by executor.

CASE NOTES

Cited in In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

ARTICLE 6.

Appointment of Personal Representative.

§ 28A-6-4. Right to contest appointment; procedure.

CASE NOTES

The right of interested persons to contest the appointment of a decedent's personal representative and the procedure for doing so under the former law, §§ 28-30 and 28-32, remains substantially unchanged under the present law. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

ARTICLE 8.

Bond.

§ 28A-8-1. Bond required before letters issue; when bond not required.

(a) Except as otherwise provided in subsection (b), every personal representative, before letters are issued, shall give bond, conditioned as provided in G.S. 28A-8-2.

(b) No bond shall be required of:

(1) A resident executor, unless the express terms of the will require him to give bond;

(2) A nonresident executor (or a resident executor who moves from this State subsequent to his appointment) who has appointed a resident agent to accept service of process as provided in G.S. 28A-4-2(a) [28A-4-2(4)], when the express terms of the will excuse him from giving bond;

(3) A nonresident executor, when there is a resident executor named who has qualified as coexecutor unless the express terms of the will require them to give bond, or the clerk of superior court finds that such bond is necessary for the protection of the estate; or

(4) A personal representative appointed solely for the purpose of bringing an action for the wrongful death of the deceased until such time as the personal representative shall receive property into the estate of the deceased; or

(5) A personal representative that is a national banking association having its principal place of business in this State or a State bank acting pursuant to G.S. 53-159;

(6) A personal representative of an intestate who resides in the State of North Carolina when all of the heirs of the decedent are over 18 years of age and file with the clerk of superior court a written waiver instrument agreeing to relieve the personal representative from the necessity of giving bond; or

(7) A personal representative where he receives all the property of the decedent;

(8) An administrator with the will annexed who resides in the State of North Carolina when all of the devisees of the decedent are over 18 years of age and file with the clerk of superior court a written waiver instrument agreeing to relieve him of the necessity of giving bond. (C.C.P., ss. 467, 468; 1870-1, c. 93; Code, ss. 1387, 1388, 2169; Rev., s.

29; C. S., s. 39; 1923, c. 56; 1967, c. 41, s. 1; 1973, c. 1329, s. 3; 1975, c. 300, s. 3; 1977, c. 29; 1981, c. 428; c. 599, ss. 5, 6.)

Effect of Amendments. — The 1977 amendment, applicable to the estates of all decedents dying on or after Oct. 1, 1975, added subdivisions (6) and (7) to subsection (b).

The first 1981 amendment, applicable to estates of persons dying on or after May 21, 1981, rewrote subdivision (7) of subsection (b), which formerly read "A personal representative when he is the sole heir and or devisee of the decedent."

The second 1981 amendment, effective Oct. 1, 1981, inserted "of an intestate" following "personal representative" near the beginning of subdivision (6) of subsection (b), and added subdivision (8) of subsection (b). Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

§ 28A-8-1.1. Deposited money; exclusion in computing amount of bond.

Notwithstanding the provisions of G.S. 28A-8-1, in any proceeding for the determination of the amount of bond to be required of the personal representative or testamentary trustee, whether at the time of appointment or subsequently, when it appears that the estate of the decedent or the testamentary trust includes money which has been or will be deposited in a bank or banks in this State, or money which has been or will be invested in an account or accounts in an insured savings and loan association or associations upon condition that such money will not be withdrawn except on authorization of the court, the court may, in its discretion, order such money so deposited or so invested and shall exclude such deposited money from the computation of the amount of such bond or reduce the amount of bond to be required in respect of such money to such an amount as it may deem reasonable.

The petitioner for letters testamentary, of administration, or of trusteeship may deliver to any such bank or association any such money in his possession, or may allow such bank to retain any such money already in its possession, or may allow such association to retain any such money already invested with it; and, in either event, the petitioner shall secure and file with the court a written receipt including the agreement of the bank or association that such money shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money, the bank or association shall be protected to the same extent as though it had received the same from a person to whom letters testamentary, of administration, or of trusteeship had been issued.

The term "account in an insured savings and loan association" as used in this section means an account insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation or by a mutual deposit guaranty association authorized by Article 7A of Chapter 54 of the General Statutes of North Carolina.

The term "money" as used in this section means the principal of the decedent's estate and does not include the income earned by the principal of the decedent's estate which may be withdrawn without any authorization of the court. (1977, c. 870, s. 1.)

Editor's Note. — Session Laws 1977, c. 870, s. 2, makes this section effective July 1, 1977.

ARTICLE 9.

Revocation of Letters.

§ 28A-9-1. Revocation after hearing.

CASE NOTES

Discretion Reviewable on Appeal. — In accord with original. See In re Will of Taylor, 293 N.C. 511, 238 S.E.2d 774 (1977).

Adverse Interest. — The finding that respondent-administrator c.t.a. and petitioner are tenants in common of certain real property of the estate which is liable for debts of the estate to the extent that the personal property is insufficient to pay such debts does not support the conclusion that respondent had a private interest that might tend to hinder or be adverse to a fair and proper administration of the estate. In re Will of Taylor, 32 N.C. App. 742, 234 S.E.2d 11 (1977).

Cited in In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

§ 28A-9-2. Summary revocation.

CASE NOTES

Cited in In re Will of Taylor, 293 N.C. 511, 238 S.E.2d 774 (1977); In re Will of Taylor, 32 N.C. App. 742, 234 S.E.2d 11 (1977).

ARTICLE 11.

Collectors.

§ 28A-11-5. Compensation.

A collector shall be compensated in accordance with Article 23 of this Chapter. (1977, c. 814, s. 4.)

Editor's Note. — Session Laws 1977, c. 814, s. 10, makes this section effective Jan. 1, 1978.

ARTICLE 12.

Public Administrator.

§ 28A-12-3. Qualification and bond.

(a) The public administrator shall qualify and give bond with regard to each estate administered by him as provided in Article 8 of this Chapter, at the expense of such estate.

(b) As an alternative to and in lieu of the bonding requirement provided in subsection (a), the administrator may, in the discretion of the clerk of superior court, enter into a single permanent bond, secured by any of the methods provided in G.S. 28A-8-2(4), payable to the State of North Carolina, conditioned upon the faithful performance of the duties of his office and obedience to all lawful orders of the clerk of superior court or other court touching the administration of any estate committed to him. The amount of the permanent bond shall be determined by the clerk, based on the total value of all the estates administered by the public administrator, and may be increased or decreased from time to time as the clerk determines is necessary. The expense of the bond shall be borne by the estates administered by the administrator, as determined by the clerk. (1868-9, c. 113, ss. 2, 3, 4; Code, ss. 1390, 1391, 1392; Rev., s. 320; 1915, c. 216; C. S., s. 19; 1941, c. 243; 1973, c. 1329, s. 3; 1979, cc. 111, 726.)

Effect of Amendments. — The first 1979 amendment deleted a former subsection (a), which required a person appointed as public administrator to give bond payable to the State, conditioned upon the faithful performance of his duties. In present subsection (a) (formerly subsection (b)), the amendment deleted the word "also" preceding "shall qualify."

The second 1979 amendment designated the provisions of the section as amended by the first 1979 amendment as subsection (a) and added subsection (b).

§ 28A-12-4. When public administrator shall apply for letters.

CASE NOTES

Cited in Baer v. Davis, 47 N.C. App. 581, 267 S.E.2d 581 (1980).

§ 28A-12-8. Compensation.

A public administrator shall be compensated in accordance with Article 23 of this Chapter. (1977, c. 814, s. 5.)

Editor's Note. — Session Laws 1977, c. 814, s. 10, makes this section effective Jan. 1, 1978.

ARTICLE 13.

Representative's Powers, Duties and Liabilities.

§ 28A-13-3. Powers of a personal representative or fiduciary.

(a) Except as qualified by express limitations imposed in a will of the decedent or a court order, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent man would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate so as to accomplish the desired result of settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law, including but not limited to the powers specified in the following subdivisions:

(1) To take possession, custody or control of the personal property of the decedent. If in the opinion of the personal representative his possession, custody or control of such property is not necessary for purposes of administration, such property may be left with or surrendered to the heir or devisee presumptively entitled thereto. He has the power to take possession, custody or control of the real property of the decedent if he determines such possession, custody or

control is in the best interest of the administration of the estate. Prior to exercising such power over real property the procedure as set out in subsection G.S. 28A-13-3(c) shall be followed. If the personal representative determines that such possession, custody or control is not in the best interest of the administration of the estate such property may be left with or surrendered to the heir or devisee presumptively entitled thereto.

(2) To retain assets owned by the decedent pending distribution or liquidation even though such assets may include items which are otherwise improper for investment of trust funds.

(3) To receive assets from other fiduciaries or other sources.

(4) To complete performance of contracts entered into by the decedent that continue as obligations of his estate, or to refuse to complete such contracts, as the personal representative may determine to be in the best interests of the estate, but such refusal shall not limit any cause of action which might have been maintained against decedent if he had refused to complete such contract. In respect to enforceable contracts by the decedent to convey an interest in land, the provisions of G.S. 28A-17-9 are controlling.

(5) To deposit, as a fiduciary, funds of the estate in a bank, including a bank operated by the personal representative upon compliance with the provisions of G.S. 36-27.

(6) To make, as a fiduciary, any form of investment allowed by law to the State Treasurer under G.S. 147-69.1, with funds of the estate, when such are not needed to meet debts and expenses immediately payable and are not immediately distributable, including money received from the sale of other assets; or to enter into other short-term loan arrangements that may be appropriate for use by trustees or beneficiaries generally. Provided, that in addition to the types of investments hereby authorized, deposits in interest-bearing accounts of any credit union authorized to do business in this State, when such deposits are insured in the same manner as required by G.S. 147-69.1 for deposits in a savings and loan association, are hereby authorized.

(7) To abandon or relinquish all rights in any property when, in the opinion of the personal representative acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit to the estate.

(8) To vote shares of stock or other securities in person or by general or limited proxy.

(9) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

(10) To hold shares of stock or other securities in the name of a nominee, without mention of the estate in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

a. The estate records and all reports or accounts rendered by the personal representative clearly show the ownership of the stock or other securities by the personal representative and the facts regarding its holdings, and

b. The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the personal representative or when such securities are deposited by the personal representative in a clearing corporation as defined in G.S. 25-8-102(3).

Such personal representative shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such personal representative had done such acts or been guilty of such omissions.

(11) To insure, at the expense of the estate, the assets of the estate in his possession, custody or control against damage or loss.

(12) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the personal representative shall deem advisable, including the power of a corporate personal representative to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the estate, and to mortgage, pledge or otherwise encumber such portion of the estate as may be required to secure such loan or loans. In respect to the borrowing of money on the security of the real property of the decedent, G.S. 28A-17-11 is controlling.

(13) To renew obligations of the decedent for the payment of money.

(14) To advance his own money for the protection of the estate, and for all expenses, losses and liabilities sustained in the administration of the estate or because of the holding or ownership of any estate assets. For such advances, with any interest, the personal representative shall have a lien on the assets of the estate as against a devisee or heir.

(15) To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.

(16) To pay taxes, assessments, his own compensation, and other expenses incident to the collection, care, administration and protection of the assets of the estate in his possession, custody or control.

(17) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(18) To allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(19) To employ persons, including attorneys, auditors, investment advisors, appraisers or agents to advise or assist him in the performance of his administrative duties.

(20) To continue any business or venture in which the decedent was engaged at the date of his death, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the decedent's interest in such business. With respect to the use of the decedent's interest in a continuing partnership, the provisions of G.S. 59-71 and 59-72 qualify this power; and with respect to farming operations engaged in by the decedent at the time of his death, the provisions of G.S. 28A-13-4 qualify this power.

(21) To incorporate or participate in the incorporation of any business or venture in which the decedent was engaged at the time of his death.

(22) To provide for the exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(23) To maintain actions for the wrongful death of the decedent according to the provisions of Article 18 of this Chapter and to compromise or settle any such claims, whether in litigation or not, provided that any such settlement shall be subject to the approval of a judge of superior court unless all persons who would be entitled to receive any damages recovered under G.S. 28A-18-2(b)(4) are competent adults and have consented in writing. It shall be the duty of the personal representative in distributing the proceeds of such settlement in any instance to take into consideration and to make a fair allocation to those claimants for funeral, burial, hospital and medical expenses which would have been payable from damages which might have been recovered had a wrongful death action gone to judgment in favor of the plaintiff.

(24) To maintain any appropriate action or proceeding to recover possession of any property of the decedent, or to determine the title thereto; to recover damages for any injury done prior to the death of the decedent to any of his property; and to recover damages for any injury done subsequent to the death of the decedent to such property.

(25) To purchase at any public or private sale of any real or personal property belonging to the decedent's estate or securing an obligation of the estate as a fiduciary for the benefit of the estate when, in his opinion, it is necessary to prevent a loss to the estate.

(26) To sell or lease personal property of the estate in the manner prescribed by the provisions of Article 16 of this Chapter.

(27) To sell or lease real property of the estate in the manner prescribed by the provisions of Article 17 of this Chapter.

(28) To enter into agreements with taxing authorities to secure the benefit of the federal marital deduction pursuant to G.S. 28A-22-6.

(29) To pay or satisfy the debts and claims against the decedent's estate in the order and manner prescribed by Article 19 of this Chapter.

(30) To distribute any sum recovered for the wrongful death of the decedent according to the provisions of G.S. 28A-18-2; and to distribute all other assets available for distribution according to the provisions of this Chapter or as otherwise lawfully authorized.

(31) To exercise such additional lawful powers as are conferred upon him by the will.

(32) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the personal representative.

(33) To renounce in accordance with the provisions of Chapter 31B of the General Statutes.

(a1) Except as qualified by express limitations imposed in a will of the decedent, and subject to the provisions of G.S. 28A-13-6 respecting the powers of joint personal representatives, a personal representative shall have absolute discretion to make the election as to which items of the decedent's personal and household effects shall be excluded from the carry over basis provision of the federal income tax law and such election shall be conclusive and binding on all concerned.

(b) Any question arising out of the powers conferred by subsections (a) and (a1) above shall be determined in accordance with the provisions of Article 18 of this Chapter.

(c) Prior to the personal representative exercising possession, custody or control over real property of the estate he shall petition the clerk of court to obtain an order authorizing such possession, custody or control. The petition shall include:

(1) A description of the real property which is the subject of the petition;
(2) The names, ages, and addresses, if known, of the devisees and heirs of the decedent;
(3) A statement by the personal representative that he has determined that such possession, custody or control is in the best interest of the administration of the estate.

The devisees and heirs will be made parties to the proceeding by service of summons in the manner prescribed by law. If the clerk of court determines that it is in the best interest of the administration of the estate to authorize the personal representative to take possession, custody or control he shall grant an order authorizing that power. (1868-9, c. 113, ss. 73, 77; Code, ss. 1501, 1505; Rev., ss. 85, 159; C. S., ss. 170, 171; 1925, c. 86; 1933, cc. 161, 196, 498; 1973, c. 1329, s. 3; 1975, c. 19, s. 9; c. 371, s. 4; 1977, c. 556; 1979, c. 467, s. 21; c. 717, s. 3.)

Editor's Note. — Section 36-27, referred to in subdivision (5) of subsection (a) of this section, was repealed by Session Laws 1977, c. 502, s. 1, effective Jan. 1, 1978. For present provisions relating to similar subject matter, see § 36A-63.

Effect of Amendments. — The 1977 amendment added subsection (a1) and substituted "subsections (a) and (a1)" for "subsection (a)" in subsection (b).

The first 1979 amendment rewrote the first sentence in subdivision (6) of subsection (a).

The second 1979 amendment added the second sentence in subdivision (6) of subsection (a).

CASE NOTES

Authority to Execute Lease. — A person who executes a lease as executor of an estate and represents to the lessee that he has authority to do so is not personally liable for a breach of the lease when an examination of the will on record would have revealed the executor did not have authority to execute the lease. Trull v. McIntyre, 48 N.C. App. 599, 269 S.E.2d 308, cert. denied, 301 N.C. 531, 273 S.E.2d 463 (1980).

Quoted in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

Stated in Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981).

§ 28A-13-5. Personal representatives hold in joint tenancy.

CASE NOTES

Cited in Trull v. McIntyre, 48 N.C. App. 599, 269 S.E.2d 308 (1980).

§ 28A-13-6. Exercise of powers of joint personal representatives by one or more than one.

(e) Subject to the provisions of subsections (b), (c) and (d) of this section, all other acts and duties must be performed by both of the personal representatives if there are two, and by a majority of them if there are more than two. No personal representative who has not joined in exercising a power shall be liable for the consequences of such exercise, nor shall a dissenting personal representative be liable for the consequences of an act in which he joins at the direction of the majority of the personal representatives, if he expressed his dissent in writing to any other personal representative at or before the time of such joinder.

(1977, c. 446, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Sept. 1, 1977, added the second sentence of subsection (e).

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

CASE NOTES

Cited in Trull v. McIntyre, 48 N.C. App. 599, 269 S.E.2d 308 (1980).

ARTICLE 14.

Notice to Creditors.

§ 28A-14-1. Advertisement for claims.

Every personal representative and collector within 20 days after the granting of letters shall notify all persons, firms and corporations having claims against the decedent to present the same to such personal representative or collector, on or before a day to be named in such notice, which day must be at least six months from the day of the first publication or posting of such notice. The notice shall set out a mailing address for the personal representative or collector. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the personal representative, or collector, the notice shall be published once a week for four consecutive weeks in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish notice to creditors if the only asset of the estate consists of a claim for damages arising from death by wrongful act. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C. S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1; 1955, c. 625; 1961, c. 26, s. 1; c. 741, s. 1; 1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Sept. 1, 1977, inserted "at least" in the first sentence and added the present second sentence.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

CASE NOTES

Notice Held Fatally Defective. — An executor's general notice to creditors published in a newspaper was fatally defective where it failed to name a day after which claims would be barred and failed to give notice that claims must be filed within six months from the day of the first publication of the notice; therefore, the notice to creditors was ineffective to start the running of the six months' statute of limitations of § 28A-19-3(a) in bar of a claim against decedent's estate to recover for personal injuries received in an automobile accident. Anderson v. Gooding, 300 N.C. 170, 265 S.E.2d 201 (1980).

OPINIONS OF ATTORNEY GENERAL

Date Named in Notice. — This section does require that the date contained in the body of a notice to creditors be exactly six months from the day of first publication or posting of such notice. Opinion of Attorney General to Mr. F. Piercy Carter, Chief Assistant Clerk of Court, Buncombe County, 46 N.C.A.G. 1 (1976).

§ 28A-14-1.1. Validation of certain notices.

(a) Any notice to creditors published or posted under G.S. 28A-14-1 which did not, in the advertisement, name the day after which claims could not be presented is validated.

(b) This section applies to all notices published and posted between October 1, 1975, and March 16, 1981, except that it does not affect any pending litigation or any litigation instituted within 90 days of March 16, 1981. (1981, c. 96, ss. 1, 2.)

§ 28A-14-2. Proof of advertisement.

CASE NOTES

Necessity of Proof. —
See also Anderson v. Gooding, 300 N.C. 170, 265 S.E.2d 201 (1980).

§ 28A-14-3. Personal notice to creditors.

The personal representative or collector may cause the notice to be personally served on any creditor. (1868-9, c. 113, s. 32; Code, s. 1424; 1885, c. 96; Rev., s. 41; C. S., s. 47; 1961, c. 741, s. 2; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; c. 798; 1979, c. 509, s. 2.)

Effect of Amendments. — Session Laws 1977, c. 446, s. 1, as amended by Session Laws 1977, c. 798, rewrote this section. Session Laws 1977, c. 446, s. 6, makes the act effective September 1, 1977, and Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

The 1979 amendment, effective Sept. 1, 1979, rewrote this section.

Session Laws 1979, c. 509, s. 3, provides: "This act shall become effective September 1, 1979, and shall apply to the administration of estates of decedents dying on or after the effective date."

CASE NOTES

Cited in Anderson v. Gooding, 43 N.C. App. 611, 259 S.E.2d 398 (1979).

ARTICLE 15.

Assets; Discovery of Assets.

§ 28A-15-1. Assets of the estate generally.

CASE NOTES

The direction from the testator that certain property in the estate not be applied to payment of estate liabilities cannot operate to prevent payment of debts, taxes and costs of administration which are justly owed. Combs v. Eller, 30 N.C. App. 30, 226 S.E.2d 197 (1976).

Stated in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

§ 28A-15-2. Title and possession of property.

CASE NOTES

Quoted in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

§ 28A-15-3. Nonexoneration of encumbered property.

Legal Periodicals. — For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

§ 28A-15-5. Order in which assets appropriated; abatement.

CASE NOTES

Cited in Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

ARTICLE 17.

Sales, Leases or Mortgages of Real Property.

§ 28A-17-1. Sales of real property.

CASE NOTES

Stated in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

§ 28A-17-9. Death of vendor under contract; representative to convey.

Legal Periodicals. — For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

§ 28A-17-12. Sale, lease or mortgage of real property by heirs or devisees.

(a) If the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 occurs within two years after the death of the decedent:

(1) All sales, leases or mortgages of real property by heirs or devisees of any resident or nonresident decedent made after the death of the decedent and before the first publication or posting of the general notice to creditors are void as to creditors and personal representatives; and

(2) All sales, leases or mortgages of real property by heirs or devisees of any resident or nonresident decedent made after such first publication or posting and before approval of the final account shall be void as to creditors and personal representatives unless the personal representative joins in the sale, lease or mortgage.

(1979, 2nd Sess., c. 1246, s. 1.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, deleted "and the transaction is approved by the clerk of superior court" at the end of subdivision (2) of subsection (a), and deleted the former second sentence of subdivision (2) of subsection (a), which detailed the manner in which the approval by the clerk of superior court was to have been manifested.

Session Laws 1979, 2nd Sess., c. 1246, s. 2, provides: "This act shall become effective on July 1, 1980, and shall apply only to the administration of estates of decedents dying on or after that date."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

ARTICLE 18.

Actions and Proceedings.

§ 28A-18-1. Survival of actions to and against personal representative.

CASE NOTES

Applied in Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843, cert. denied, 298 N.C. 298, 259 S.E.2d 300 (1979); Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980); Tinkham v. Hall, 47 N.C. App. 651, 267 S.E.2d 588 (1980).

§ 28A-18-2. Death by wrongful act of another; recovery not assets.

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding one thousand five hundred dollars ($1,500) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

(b) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:
   a. Net income of the decedent,
   b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
   c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, willful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

(c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.

(d) In all actions brought under this section the dying declarations of the deceased shall be admissible as provided for in G.S. 8-51.1. (R. C., c. 1, s. 10; c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70-72, 115; Code, ss. 1498-1500; Rev., ss. 59, 60; 1919, c. 29; C. S., ss. 160, 161; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136; 1969, c. 215; 1973, c. 464, s. 2; c. 1329, s. 3; 1981, c. 468.)

Cross References. — As to power of personal representative to maintain action for wrongful death and to compromise or settle any such claims, subject to approval of judge of superior court, see § 28A-13-3(23) in the replacement volume.

Effect of Amendments. — The 1981 amendment substituted "one thousand five hundred dollars ($1,500)" for "five hundred dollars ($500.00)" in the second sentence of subsection (a).

Legal Periodicals. — For survey of 1976 case law on torts, see 55 N.C.L. Rev. 1088 (1977).

For a survey of 1977 law on torts, see 56 N.C.L. Rev. 1136 (1978).

For a note on the interaction between North Carolina's wrongful death statute and its statute of limitations for not readily apparent personal injuries or product defects, see 13 Wake Forest L. Rev. 543 (1977).

For survey of 1979 tort law, see 58 N.C.L. Rev. 1561 (1980).

For article entitled, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

CASE NOTES

I. IN GENERAL.

No Such Right Existed at Common Law. —

In accord with 1st paragraph in original. See Christenbury v. Hedrick, 32 N.C. App. 708, 234 S.E.2d 3 (1977).

Such Right is Purely Statutory. —

In accord with 1st paragraph in original. See Burcl v. North Carolina Baptist Hosp., 47 N.C. App. 127, 266 S.E.2d 726 (1980).

Construction. —

In accord with original. See Christenbury v. Hedrick, 32 N.C. App. 708, 234 S.E.2d 3 (1977).

For case construing "person" in former § 28-173, etc. —

In accord with original. See Yow v. Nance, 29 N.C. App. 419, 224 S.E.2d 292, cert. denied, 290 N.C. 312, 225 S.E.2d 833 (1976).

For case calling for legislative action, etc. —

In accord with original. See Yow v. Nance, 29 N.C. App. 419, 224 S.E.2d 292, cert. denied, 290 N.C. 312, 225 S.E.2d 833 (1976).

The right of action for wrongful death, etc. —

This section makes it a condition precedent to a right of action in a personal representative that the death of the intestate was caused by a wrongful act, neglect or default of the manufacturer "such as would, if the injured person had lived, have entitled him to an action for damages therefor." Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

The condition precedent, "such as would, if the injured person had lived, have entitled him to an action for damages therefor," to the maintenance of an action under this section does not, by its express terms, include a time limitation but, upon its face, relates to the nature of the "wrongful act, neglect or default" which caused the death and to the legal capacity of the decedent to sue therefor had he lived. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

Applied in Pinkston v. Baldwin, Lima, Hamilton Co., 292 N.C. 260, 232 S.E.2d 431 (1977); Hinton v. City of Raleigh, 46 N.C. App. 305, 264 S.E.2d 777 (1980).

Stated in Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980); Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980).

Cited in Nicholson v. Hugh Chatham Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

III. PARTIES TO THE ACTION.

Action by Administrator of Employee Covered by Workers' Compensation Act. — The administrator of an employee within the Workers' Compensation Act cannot sue the employer for the wrongful death of the employee since the employee could not have sued the employer for his injury had he lived. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

Action by Administrator of Child against Parents. — Except as § 1-539.21 now provides, the administrator of an unemancipated minor child cannot bring an action for wrongful death against the child's negligent parent. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

IV. DISTRIBUTION OF RECOVERY.

Action Not Abated upon Death of Primary Beneficiary. — Although the Wrongful Death Act was amended drastically in some respects in 1969, there was absolutely no change in the basic portions allowing the action and providing for the disposition of the recovery. There is nothing in the amended statute which would, in any way, indicate any intent on the part of the legislature that a wrongful death action should abate upon the death of the primary beneficiary pending determination of the action. Willis v. Duke Power Co., 42 N.C. App. 582, 257 S.E.2d 471 (1979).

V. DAMAGES RECOVERABLE.

As to measure of damages under former statute. —

See Mosley v. United States, 538 F.2d 555 (4th Cir. 1976).

Expert Testimony as to Monetary Value of Decedent. — An expert economist's testimony in a wrongful death action as to the present monetary value of the decedent to the persons entitled to receive damages under subsection (b) was properly admitted in evidence without the witness first having placed into evidence the statistics, formulae, calculations and economic assumptions used in arriving at his opinion. While the failure to elaborate on the witness' computations might have weakened the probative value of the testimony, it did not affect its admissibility. Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979).

Subsection (b)(6) supplies a statutory basis, etc. —

In accord with 1st paragraph in original. See Lentz v. Gardin, 30 N.C. App. 379, 226 S.E.2d 839, cert. granted, 290 N.C. 777, 229 S.E.2d 33 (1976), remanded on other grounds, 294 N.C. 425, 241 S.E.2d 508 (1978).

Cited in Sadler v. New Hanover Mem. Hosp., 432 F. Supp. 604 (E.D.N.C. 1977); Holt v. City of Statesville, 35 N.C. App. 381, 241 S.E.2d 362 (1978).

§ 28A-18-3. To sue or defend in representative capacity.

Legal Periodicals. — For a note on the Erie doctrine and Rule 15(c), see 16 Wake Forest L. Rev. 621 (1980).

CASE NOTES

Applied in Tinkham v. Hall, 47 N.C. App. 651, 265 S.E.2d 588 (1980).

Cited in Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980).

ARTICLE 19.

Claims against the Estate.

§ 28A-19-1. Manner of presentation of claims.

(a) A claim against a decedent's estate must be in writing and state the amount or item claimed, or other relief sought, the basis for the claim, and the name and address of the claimant; and must be presented by one of the following methods:

(1) By delivery to the personal representative or collector. Such claim will be deemed to have been presented from the time of such delivery.

(2) By mailing, first-class mail, to the personal representative or collector at the address set out in the general notice to creditors. Such claim will be deemed to have been presented from the time of deposit of the claim enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care of the United States Postal Service.

(b) In an action commenced after the death of the decedent against his personal representative or collector as such, the commencement of the action in the court in which such personal representative or collector qualified will constitute the presentation of a claim and no further presentation is necessary. In an action filed in any other court such claim will be deemed to have been presented at the time of the completion of service of process on such personal representative or collector.

(c) In an action pending against the decedent at the time of his death, which action survives at law, the substitution of the personal representative or collector for the decedent or motion therefor will constitute the presentation of a claim and no further presentation is necessary. Such claim will be deemed to have been presented from the time of the substitution, or motion therefor. (1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Sept. 1, 1977, rewrote this section.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

§ 28A-19-2. Further information or affidavit of claim may be required.

(a) If the personal representative or collector so elects, he may demand any or all of the following prior to taking action on the claim:

(1) If the claim is not yet due, that the date when it will become due be stated;

(2) If the claim is contingent or unliquidated, that the nature of the uncertainty be stated;

(3) If the claim is secured, that the security be described.

(b) Upon any claim being presented against the estate in the manner prescribed in G.S. 28A-19-1, the personal representative or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant; or if any payments have been made, or any offsets exist that their nature and amount be shown by the evidence or stated in the affidavit. (1868-9, c. 113, s. 33; Code, s. 1425; Rev., s. 91; C. S., s. 98; 1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Sept. 1, 1977, designated the former provisions of this section as subsection (b) and added subsection (a).

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

§ 28A-19-3. Limitations on presentation of claims.

(a) All claims against a decedent's estate which arose before the death of the decedent, except contingent claims based on any warranty made in connection with the conveyance of real estate and claims of the United States and tax claims of the State of North Carolina and subdivisions thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis, which are not presented to the personal representative or collector pursuant to G.S. 28A-19-1 by the date specified in the general notice to creditors as provided for in G.S. 28A-14-1 are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, except claims of the United States and tax claims of the State of North Carolina and subdivisions thereof whether due or to become due, absolute or contingent, liquidated or unliquidated, secured or unsecured, founded on contract, tort, or other legal basis are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent unless presented to the personal representative or collector as follows:

(1) With respect to any claim based on a contract with the personal representative or collector, within six months after the date on which performance by the personal representative or collector is due;

(2) With respect to any claim other than a claim based on a contract with the personal representative or collector, within six months after the date on which the claim arises.

(d) All claims of creditors upon whom there has been personal service of notice as provided in G.S. 28A-14-3 are forever barred unless presented to the personal representative or collector within the time and manner set out in this Article.

(e) Unless a claim has been presented pursuant to G.S. 28A-19-1 giving notice of an action or special proceeding pending against a decedent at the time of his death and surviving under G.S. 28A-18-1 by the date specified in the general notice to creditors as provided in G.S. 28A-14-1, no recovery may be had upon any judgment obtained in any such action or proceeding against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent.

(i) Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent or personal representative; or

(2) Any proceeding or action to establish the liability of the decedent or personal representative; or

(3) The recovery on any judgment against the decedent or personal representative

to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim, proceeding or judgment. (1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1979, c. 509, s. 1.)

Effect of Amendments. — The 1977 amendment effective Sept. 1, 1977, in subsection (a), inserted "against a decedent's estate which arose before the death of the decedent" and "tax claims of" and substituted "real estate and claims" for "real estate, against the decedent's estate which arose before the death of the decedent, including claims" and "by the date specified in" for "within six months after the day of the first publication or posting of." In subsection (b), the amendment substituted "except claims of the United States and tax claims of" for "which arise at or after the death of the decedent, including claims of the United States and" in the introductory paragraph, substituted "With respect to any claim" for "A claim" in subdivision (1), inserted "the date on which" in subdivision (1), added "with respect to" to the beginning of subdivision (2), and inserted "the date on which" in subdivision (2). In subsection (d), the amendment substituted "the time and manner set out in this Article" for "three months from the date of such service" at the end and deleted the former second sentence, which read "Nothing herein contained, however, shall be construed as extending the period provided by subsections (a) and (b) hereof." In subsection (e), the amendment substituted "a claim has been presented pursuant to G.S. 28A-19-1 giving notice of an action or special proceeding" for "notice of actions or special proceedings" and "by the date specified in" for "is presented to the personal representative or collector within six months after the day of the first publication or posting of" and added "against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent" to the end.

The 1979 amendment, effective Sept. 1, 1979, added subsection (i).

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

Session Laws 1979, c. 509, s. 3, provides: "This act shall become effective September 1, 1979, and shall apply to the administration of estates of decedents dying on or after the effective date."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsections (a), (b), (d), (e), and (i) are set out.

CASE NOTES

Proof of Advertisement Required. — When an administrator or executor pleads subsection (a) of this section as a defense against claims presented against the estate, he must establish the fact that he did advertise as required by § 28A-14-1. Failure of such proof causes failure of the defense. Anderson v. Gooding, 300 N.C. 170, 265 S.E.2d 201 (1980).

Notice to Creditors Held Fatally Defective. — An executor's general notice to creditors published in a newspaper was fatally defective where it failed to name a day after which claims would be barred and failed to give notice that claims must be filed within six months from the day of the first publication of the notice; therefore, the notice to creditors was ineffective to start the running of the six months' statute of limitations of subsection (a) of this section in bar of a claim against decedent's estate to recover for personal injuries received in an automobile accident. Anderson v. Gooding, 300 N.C. 170, 265 S.E.2d 201 (1980).

Applied in Anderson v. Gooding, 43 N.C. App. 611, 259 S.E.2d 398 (1979); Baer v. Davis, 47 N.C. App. 581, 267 S.E.2d 581 (1980).

Cited in Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979); Joyner v. Wilson Mem. Hosp., 38 N.C. App. 720, 248 S.E.2d 881 (1978).

§ 28A-19-4. Payment of claims and charges.

As soon as the personal representative or collector is possessed of sufficient means over and above the other costs of administration, he shall pay the year's allowances in the amounts and in the manner prescribed in G.S. 30-15 to 30-33. Prior to the date specified in the general notice to creditors as provided for in G.S. 28A-14-1, the personal representative or collector may pay such other claims and charges as he deems in the best interest of the estate if the total assets are sufficient to pay all claims and charges against the estate. (1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Sept. 1, 1977, substituted "the date specified in" for "expiration of six months after the day of the first publication or posting of" in the second sentence.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

§ 28A-19-5. Contingent claims.

CASE NOTES

Cited in Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

§ 28A-19-6. Order of payment of claims.

After payment of costs and expenses of administration, the claims against the estate of a decedent must be paid in the following order:

First class. Claims which by law have a specific lien on property to an amount not exceeding the value of such property.

Second class. Funeral expenses to the extent of one thousand dollars ($1,000). This limitation shall not include cemetery lot or gravestone. The preferential limitation herein granted shall be construed to be only a limit with respect to preference of payment and shall not be construed to be a limitation on reasonable funeral expenses which may be incurred; nor shall the preferential limitation of payment in the amount of one thousand dollars ($1,000) be diminished by any Veterans Administration, social security or other federal governmental benefits awarded to the estate of the decedent or to his or her beneficiaries.

Third class. All dues, taxes, and other claims with preference under the laws of the United States.

Fourth class. All dues, taxes, and other claims with preference under the laws of the State of North Carolina and its subdivisions.

Fifth class. Judgments of any court of competent jurisdiction within the State, docketed and in force, to the extent to which they are a lien on the property of the decedent at his death.

Sixth class. Wages due to any employee employed by the decedent, which claim for wages shall not extend to a period of more than 12 months next preceding the death; or if such employee was employed for the year current at the decease, then from the time of such employment; for medical services within the 12 months preceding the decease; for drugs and all other medical supplies necessary for the treatment of such decedent during the last illness of such decedent, said period of last illness not to exceed 12 months.

Seventh class. All other claims. (1868-9, c. 113, s. 24; Code, s. 1416; Rev., s. 87; C. S., s. 93; 1941, c. 271; 1955, c. 641, s. 1; 1967, c. 1066; 1973, c. 1329, s. 3; 1981, c. 383, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, and applicable to estates of persons dying on or after that date, substituted "one thousand dollars ($1,000)" for "six hundred dollars ($600.00)" in two places in the paragraph relating to debts of the second class.

§ 28A-19-12. Claims due representative not preferred.

No property or assets of the decedent shall be retained by the personal representative or collector in satisfaction of his own claim, in preference to others of the same class. Prior to payment of his own claim the personal representative shall receive written approval of the clerk of superior court. If the clerk does not approve the claim the personal representative may refer the claim as a disputed claim under the provisions of G.S. 28A-19-15. The provisions of G.S. 28A-19-1 and G.S. 28A-19-3 shall not apply to such claims and the personal representative may present his own claim at any time prior to the filing of his final account. (1868-9, c. 113, s. 28; Code, s. 1420; Rev., s. 89; C. S., s. 96; 1973, c. 1329, s. 3; 1979, c. 525, s. 4.)

Effect of Amendments. — The 1979 amendment deleted, at the end of the first sentence, "but such claim must be established upon the same proof and paid in like manner and order as required by law in case of other debts," and added the second, third and fourth sentences.

Session Laws 1979, c. 525, s. 12, provides that the amendment to this section shall apply only to the administration of estates of decedents dying on or after its effective date. The amendment was made effective on ratification, May 8, 1979.

§ 28A-19-13. No preference within class.

CASE NOTES

Allowing Set Off Held Error. — The trial court erred in entering judgment allowing defendant to set off the amount owed by decedent to defendant at the time of decedent's death against defendant's debt owed to plaintiff administratrix for the post mortem purchase of assets in decedent's insolvent estate, since to allow defendant to collect more in her role as a creditor merely because she "purchased" assets from the estate would unduly prejudice all other creditors. Defendant's counterclaim against the estate was limited to her pro rata share of the funds available for her class of creditors. Rodgers v. Tindal, 46 N.C. App. 783, 266 S.E.2d 691 (1980).

§ 28A-19-15. Disputed claim may be referred.

CASE NOTES

Cited in Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

§ 28A-19-16. Disputed claim not referred barred in three months.

CASE NOTES

Stated in Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

Cited in Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

§ 28A-19-18. When costs against representative allowed.

CASE NOTES

Stated in Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

ARTICLE 21.

Accounting.

§ 28A-21-1. Annual accounts.

Until the final account has been filed pursuant to G.S. 28A-21-2, the personal representative or collector shall, within 30 days after the expiration of one year from the date of his qualification and annually, so long as any of the property of the estate remains in his control, custody or possession, file in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk of superior court may examine, under oath, such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate. He must carefully review and audit such account and, if he approves the account, he must endorse his approval thereon, which shall be prima facie evidence of correctness, and cause the same to be recorded. (C. C. P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev., s. 99; C. S., s. 105; 1957, c. 783, s. 5; 1973, c. 1329, s. 3; 1977, c. 446, s. 1; 1981, c. 955, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Sept. 1, 1977, substituted "Until the final account has been filed" for "If an extension of time to file the final account has been granted by the clerk of superior court" at the beginning of the section.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

The 1981 amendment rewrote the second sentence, which formerly read "He must produce vouchers for all payments."

§ 28A-21-2. Final accounts.

(a) Unless the time for filing the final account has been extended by the clerk of superior court, the personal representative or collector must file his final account for settlement within one year of his qualification or within six months after his receipt of the State inheritance tax release, whichever is later. If the total value of the decedent's property subject to inheritance or estate tax, both real and personal, including the value of transfers over which the decedent retained any interest as described in G.S. 105-2(3), as well as the taxable value of any gifts made within three years prior to the date of death of the decedent, as also required by G.S. 105-2(3), is less than twenty thousand dollars ($20,000) and all of the beneficiaries belong to the class (A) as defined in G.S. 105-4(a), then the personal representative or collector shall certify in the final account filed with the clerk of superior court that no inheritance tax return was required to be filed with the Department of Revenue pursuant to G.S. 105-23. Such certification shall list the amount and value of all of the decedent's property, and with respect to real estate, its particular location within or outside the State, including any property transferred by the decedent over which he had retained any interest as described in G.S. 105-2(3), or any property transferred within three years prior to the date of the decedent's death, and after being filed and accepted by the clerk of the superior court shall be prima facie evidence that such property is free of any State inheritance or State estate tax liability. The personal representative or collector shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. With the approval of the clerk of superior court, such account may be filed voluntarily at any time. In all cases, the accounting shall be reviewed, audited and recorded by the clerk of superior court in the manner prescribed in G.S. 28A-21-1.

(b) Except as provided in subsection (a), after the date specified in the general notice to creditors as provided for in G.S. 28A-14-1, if all of the debts and other claims against the estate of the decedent duly presented and legally owing have been paid in the case of a solvent estate or satisfied pro rata according to applicable statutes in the case of an insolvent estate, the personal representative or collector may file his final account to be reviewed, audited and recorded by the clerk of superior court. Nothing in this subsection shall be construed as limiting the right of the surviving spouse or minor children to file for allowances under G.S. 30-15 through 30-18 and the right of a surviving spouse to file for property rights under G.S. 29-30. (C. C. P., s. 481; Code, s. 1402; Rev., s. 103; C. S., s. 109; 1973, c. 1329, s. 3; 1975, c. 637, s. 5; 1977, c. 446, s. 1; 1979, c. 801, s. 13; 1981, c. 955, s. 2.)

Effect of Amendments. — The 1977 amendment, effective Sept. 1, 1977, and applicable only to the administration of the estates of persons who die on or after that date, substituted "after the date specified in" for upon the expiration of six months after the day of the first publication or posting of" near the beginning of the first sentence of subsection (b).

The 1979 amendment, effective July 1, 1979, with respect to estate of decedents dying on or after that date, added the second and third sentences of subsection (a).

The 1981 amendment rewrote the fourth sentence of subsection (a), which formerly read "He must produce vouchers for all payments."

CASE NOTES

Filing of Final Account Does Not Discharge Executor. — The removal or discharge of an executor or administrator is not effected by the approval of his final account without a formal order of discharge. Joyner v. Wilson Mem. Hosp., 38 N.C. App. 720, 248 S.E.2d 881 (1978).

Service of Process upon Executrix Prior to Formal Discharge. — Where the executrix had filed her final account but no formal orders of discharge were entered by the clerk of court, the executrix was still empowered to act and service of process upon her was proper in a medical malpractice action. Joyner v. Wilson Mem. Hosp., 38 N.C. App. 720, 248 S.E.2d 881 (1978).

ARTICLE 22.

Distribution.

§ 28A-22-8. Executor or trustee; discretion over distributions.

Unless otherwise restricted by the terms of the will or trust, an executor or trustee shall have absolute discretion to make distributions in cash or in specific property, real or personal, or an undivided interest therein or partly in cash or partly in such property, and to do so without regard to the income tax basis for federal tax purposes of specific property allocated to any beneficiary. (1977, c. 740.)

§ 28A-22-9. Distribution to known but unlocated devisees or heirs.

(a) If there are known but unlocated devisees or heirs, the personal representative may deliver the share of such devisee or heir to the clerk of superior court immediately prior to filing of the final account. If the devisee or heir is located after the final account has been filed, he may present a claim for the share to the clerk. If the clerk determines that the claimant is entitled to the share, he shall deliver the share to the devisee or claimant. If the clerk denies the claim, the claimant may take an appeal as in a special proceeding.

(b) The clerk shall hold the share without liability for profit or interest. If no claim has been presented within a period of five years after the filing of the final account, the clerk shall deliver the share to the State Treasurer as abandoned property.

(c) The clerk shall not be required to publish any notice to such devisee or heir and shall not be required to report such share to the State Treasurer. If the devisee or heir is located, the clerk shall inform the devisee or heir that he is entitled to file a claim with the State Treasurer for the share under the provisions of G.S. 116B-34(a). (1979, 2nd Sess., c. 1311, s. 2.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1311, s. 2, makes the act effective January 1, 1981.

ARTICLE 23.

Settlement.

§ 28A-23-1. Settlement after final account filed.

When the personal representative or collector has paid or otherwise satisfied or provided for all claims against the estate, has distributed the remainder of the estate pursuant to G.S. 28A-22-1 and has filed his final account for settlement pursuant to G.S. 28A-21-2, if the clerk of superior court, after review of the personal representative's or collector's final account, approves the same, he shall enter an order discharging the personal representative or collector from further liability. (1973, c. 1329, s. 3; 1977, c. 446, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Sept. 1, 1977, substituted "G.S. 28A-21-2" for "G.S. 28A-22-5" near the middle of the section.

Session Laws 1977, c. 446, s. 5, provides: "This act shall apply only to the administration of the estates of persons who die on or after the effective date of this act."

§ 28A-23-3. Commissions allowed personal representatives; representatives guilty of misconduct or default.

(a) Personal representatives, collectors or public administrators shall be entitled to commissions to be fixed in the discretion of the clerk of superior court not to exceed five percent (5%) upon the amounts of receipts, including the value of all personal property when received, and upon the expenditures made in accordance with law, which commissions shall be charged as a part of the costs of administration and, upon allowance, may be retained out of the assets of the estate against creditors and all other persons claiming an interest in the estate. Provided, however, when the gross value of an estate is two thousand dollars ($2,000) or less, the clerk of superior court is authorized and empowered to fix the commission to be received by the personal representative, collector or public administrator in an amount as he, in his discretion, deems just and adequate.

(e) No personal representative, collector or public administrator, who has been guilty of such default or misconduct in the due execution of his office resulting in the revocation of his appointment under the provisions of G.S. 28A-9-1, shall be entitled to any commission under the provisions of this section.

(f) For the purpose of computing commissions whenever any portion of the dividends, interest, rents or other amounts payable to a personal representative, collector or public administrator is required by any law of the United States or other governmental unit to be withheld for income tax purposes by the person, corporation, organization or governmental unit paying the same, the amount so withheld shall be deemed to have been received and expended. (1868-9, c. 113, s. 95; 1869-70, c. 189; Code, s. 1524; Rev., s. 149; C. S., s. 157; 1941, c. 124; 1953, c. 855; 1959, c. 622; c. 879, s. 8; 1961, cc. 362, 575; 1973, c. 1329, s. 3; 1977, c. 814, s. 2.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "collectors or public administrators" for "testamentary trustees, collectors, or other fiduciaries" in the first sentence of subsection (a) and substitued "collector or public administrator" for "testamentary trustee, collector or other fiduciary" in the second sentence of subsection (a) and in subsection (e) and for "trustee, collector or other fiduciary" in subsection (f).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsections (a), (e) and (f) are set out.

CASE NOTES

Cited in Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

§ 28A-23-4. Counsel fees allowable to attorneys serving as representatives.

The clerk of superior court, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as a personal representative, collector or public administrator (in addition to the commissions allowed him as such representative, collector or public administrator) where such attorney in behalf of the estate he represents renders professional services, as an attorney, which are beyond the ordinary routine of administration and of a type which would reasonably justify the retention of legal counsel by any such representative, collector or public administrator not himself licensed to practice law. (1957, c. 375; 1973, c. 1329, s. 3; 1977, c. 814, s. 3.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "collector or public administrator" for "testamentary trustee, collector, or other fiduciary" and for "or fiduciary" in two places and deleted "or trust" following "in behalf of the estate."

ARTICLE 24.

Uniform Simultaneous Death Act.

§ 28A-24-1. Disposition of property where no sufficient evidence of survivorship.

CASE NOTES

Applied in McBryde v. Ferebee, 46 N.C. App. 116, 264 S.E.2d 129 (1980).

ARTICLE 25.

Small Estates.

§ 28A-25-6. Payment to clerk of money owed intestate.

(a) As an alternative to the small estate settlement procedures of this Article, any person indebted to an intestate may satisfy such indebtedness by paying the amount of the debt to the clerk of the superior court of the county of the domicile of the intestate:

(1) If no administrator has been appointed, and
(2) If the amount owed by such person does not exceed two thousand dollars ($2,000), and
(3) If the sum tendered to the clerk would not make the aggregate sum which has come into the clerk's hands belonging to the intestate exceed two thousand dollars ($2,000).

(b) Such payments may not be made to the clerk if the total amount paid or tendered with respect to any one intestate would exceed two thousand dollars ($2,000), even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed two thousand dollars ($2,000).

(c) If the sum tendered pursuant to this section would make the aggregate sum coming into the clerk's hands with respect to any one intestate exceed two thousand dollars ($2,000) the clerk shall appoint an administrator, or the sum may be administered under the preceding sections of this Article.

(d) If it appears to the clerk after making a preliminary survey that disbursements pursuant to this section would not exhaust funds received pursuant to this section, he may, in his discretion, appoint an administrator, or the funds may be administered under the preceding sections of this Article.

(e) The receipt from the clerk of the superior court of a payment purporting to be made pursuant to this section is a full release to the debtor for the payment so made.

(f) If no administrator has been appointed, the clerk of superior court shall disburse the money received under this section for the following purposes and in the following order:

(1) To pay the surviving spouse's year's allowance and children's year's allowance assigned in accordance with law;
(2), (3) Repealed by Session Laws 1981, c. 383, s. 3.
(4) All other claims shall be disbursed according to the order set out in G.S. 28A-19-6.

Notwithstanding the foregoing provisions of this subsection, the clerk shall pay, out of funds provided the deceased pursuant to G.S. 111-18 and Part 6 of Article 2 of Chapter 108 of the General Statutes of North Carolina, any lawful claims for domiciliary care received by the deceased, incurred not more than 90 days prior to his death. After the death of a spouse who died intestate and after the disbursements have been made in accordance with this subsection, the balance in the clerk's hands belonging to the estate of the intestate shall be paid to the surviving spouse, and if there is no surviving spouse, the clerk shall pay it to the heirs or distributees in proportion to their respective interests.

(g) The clerk shall not be required to publish notice to creditors.

(h) Whenever an administrator is appointed after a clerk of superior court has received any money pursuant to this section, the clerk shall pay to the administrator all funds which have not been disbursed. The clerk shall receive no commissions for payments made to the administrator, and the administrator shall receive no commission for receiving such payments. (1921, c. 93; Ex. Sess. 1921, c. 65; C. S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc.

63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762; 1951, c. 380, s. 1; 1955, c. 1246, ss. 1-3; 1957, c. 491; 1959, c. 795, ss. 1-4; 1965, c. 576, s. 1; 1973, c. 23; c. 1329, s. 1; 1975, c. 344; 1979, c. 163; c. 762, s. 1; 1981, c. 383, s. 3.)

Editor's Note. — Chapter 108, referred to in this section, was repealed by Session Laws 1981, c. 275. See now Chapter 108A.

Effect of Amendments. — The first 1979 amendment, effective May 19, 1979, added the first sentence in the second paragraph of subsection (f).

The second 1979 amendment, effective July 1, 1979, inserted "G.S. 111-18 and" following "pursuant to" in the sentence added by the first 1979 amendment.

The 1981 amendment, effective Oct. 1, 1981, and applicable to estates of persons dying on or after that date, deleted subdivision (2), relating to claims for funeral expenses, and subdivision (3), relating to claims for hospital, medical and doctor's bills, and added subdivision (4), all in subsection (f).

ARTICLE 26.

Foreign Personal Representatives and Ancillary Administration.

§ 28A-26-3. Ancillary administration.

Legal Periodicals. — For a note on the Erie doctrine and Rule 15(c), see 16 Wake Forest L. Rev. 621 (1980).

CASE NOTES

Stated in Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980).

Cited in In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980).

§ 28A-26-5. Authority of domiciliary personal representative of a nonresident decedent.

CASE NOTES

Cited in In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980).

§ 28A-26-8. Duties of personal representative in an ancillary administration.

CASE NOTES

Applied in In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980).

Chapter 28C.

Estates of Missing Persons.

Sec.
28C-5. Service of notices.

§ 28C-5. Service of notices.

All notices required under this Chapter shall be served on all parties to the action and on all other persons entitled to such notice in the manner now prescribed by Rules of Civil Procedure, and in addition thereto the absentee shall be served by publication once in each of four successive weeks in one or more newspapers in the county where the proceeding is pending, and one copy shall be posted in a conspicuous place upon each parcel of land shown in the temporary receiver's inventory, and one copy shall be sent by registered or certified mail with return receipt requested to the last known address of such absentee. The judge may in his discretion cause other and further notice to be given within or without the county. (1965, c. 815, s. 1; 1973, c. 1329, s. 2; 1981, c. 682, s. 8.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Rules of Civil Procedure" for "G.S. 1-585 through 1-592" near the beginning of the first sentence.

Chapter 29.

Intestate Succession.

Article 2.

Shares of Persons Who Take upon Intestacy.

Sec.
29-14. Share of surviving spouse.

Article 3.

Distribution among Classes.

29-16. Distribution among classes.

Article 6.

Illegitimate Children.

Sec.
29-19. Succession by, through and from illegitimate children.
29-21. Share of surviving spouse.
29-22. Shares of others than the surviving spouse.

ARTICLE 1.

General Provisions.

§ 29-1. Short title.

Legal Periodicals. — For a note discussing the limitation on collateral inheritance in North Carolina, see 14 Wake Forest L. Rev. 1085 (1978).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

Purpose of Chapter. — Taken as a whole, this Chapter conveys an intent by the legislature to write a reasonable will for those residents who have not done so. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

§ 29-2. Definitions.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For a note on a surviving spouse's right to dissent, see 16 Wake Forest L. Rev. 251 (1980).

CASE NOTES

Computation of Net Estate. — To ascertain "net estate" under § 29-2(5) it is necessary to subtract from the value of the gross estate, "family allowances, costs of administration, and all lawful claims against the estate." Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Federal Estate Tax is "Lawful Claim." — The federal estate tax is one of the "lawful claims" against testator's estate, and the widow's intestate share of the estate is to be computed after its deduction. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Stated in Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

§ 29-7. Collateral succession limited.

Legal Periodicals. — For a note discussing the limitation on collateral inheritance in North Carolina, see 14 Wake Forest L. Rev. 1085 (1978).

For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

CASE NOTES

Rights of collateral succession are limited to the descendants of the intestate's parents or grandparents. This section limits such succession to those persons who are within five degrees of kinship to the intestate, and the effect of the proviso engrafted upon this section is to provide for unlimited succession by collateral kinsmen descended from the intestate's parents or grandparents in the event there are no collateral kinsmen of the fifth degree in such lines of descent. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

The limitation upon collateral succession to heirs within five degrees of kinship to the intestate contained in this section is a limitation upon succession by heirs descended from parents or grandparents of the intestate. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

Escheats not Eliminated by Proviso of this Section. — This section at most imposes a limitation upon intestate succession, as defined in § 29-15, and by its proviso restates the existing effect of § 29-15, i.e., that collateral descent shall be unlimited when it is within the parentela of an intestate's parents or grandparents. Thus, in enacting this section, the legislature did not intend to eliminate escheats. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

Effect of Section as to Escheat under § 29-12. — This section has no application to escheat under § 29-12 unless the common ancestor of the collateral kin and the decedent is a parent or grandparent of the decedent. In such an event the main clause in this section operates to exclude a collateral kinsman of a sixth or higher degree from succeeding to the estate, even though he is a lineal descendent of the decedent's parents or grandparents. The proviso in this section, in order to prevent the escheat of the decedent's estate, provides for unlimited succession by collateral kinsmen who are descendants of the decedent's parents or grandparents when there is no such collateral kinsman within the fifth degree. Newlin v. Gill, 32 N.C. App. 392, 232 S.E.2d 213, aff'd, 293 N.C. 348, 237 S.E.2d 819 (1977).

§ 29-12. Escheats.

Legal Periodicals. — For a note discussing the limitation on collateral inheritance in North Carolina, see 14 Wake Forest L. Rev. 1085 (1978).

For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

CASE NOTES

Presumption That Distant Relatives Not Included in Will. — Underlying this provision for escheat of the estate in the absence of certain relatives is a logical presumption that the intestate would not have included distant relatives in his will. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

Effect of § 29-7 as to Escheat under This Section. — Section 29-7 has no application to escheat under this section unless the common ancestor of the collateral kin and the decedent is a parent or grandparent of the decedent. In such an event the main clause in § 29-7 operates to exclude a collateral kinsman of a sixth or higher degree from succeeding to the estate, even though he is a lineal descendent of the decedent's parents or grandparents. The proviso in § 29-7 in order to prevent the escheat of the decedent's estate provides for unlimited succession by collateral kinsmen who are descendants of the decedent's parents or grandparents when there is no such collateral kinsman within the fifth degree. Newlin v. Gill, 32 N.C. App. 392, 232 S.E.2d 213, aff'd, 293 N.C. 348, 237 S.E.2d 819 (1977).

Section 29-7 at most imposes a limitation upon intestate succession, as defined in § 29-15, and by its proviso restates the existing effect of § 29-15, i.e., that collateral descent shall be unlimited when it is within the parentela of an intestate's parents or grandparents. Thus, in enacting § 29-7, the legislature did not intend to eliminate escheats. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

Article 2.

Shares of Persons Who Take upon Intestacy.

§ 29-14. Share of surviving spouse.

(a) Real Property. — The share of the surviving spouse in the real property is:

(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, a one-half undivided interest in the real property;

(2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, a one-third undivided interest in the real property;

(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by one or more parents, a one-half undivided interest in the real property;

(4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or by a parent, all the real property.

(b) Personal Property. — The share of the surviving spouse in the personal property is:

(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, and the net personal property does not exceed fifteen thousand dollars ($15,000) in value, all of the personal property; if the net personal property exceeds fifteen thousand dollars ($15,000) in value, the sum of fifteen thousand dollars ($15,000) plus one half of the balance of the personal property;

(2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, and the net personal property does not exceed fifteen thousand dollars ($15,000) in value, all of the personal property; if the net personal property exceeds fifteen thousand dollars ($15,000) in value, the sum of fifteen thousand dollars ($15,000) plus one third of the balance of the personal property;

(3) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, but is survived by one or more parents, and the net personal property does not exceed twenty-five thousand dollars ($25,000) in value, all of the personal property; if the net personal property exceeds twenty-five thousand dollars ($25,000) in value, the sum of twenty-five thousand dollars ($25,000) plus one half of the balance of the personal property;

(4) If the intestate is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent, all of the personal property. (1959, c. 879, s. 1; 1979, c. 186, s. 1; 1981, c. 69.)

Effect of Amendments. — The 1979 amendment, effective Oct. 1, 1979 and applicable to the estates of decedents dying on or after that date, rewrote this section.

The 1981 amendment, applicable to estates of persons dying on or after March 5, 1981, again rewrote the section.

Legal Periodicals. — For a note discussing the limitation on collateral inheritance in North Carolina, see 14 Wake Forest L. Rev. 1085 (1978).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For a note on a surviving spouse's right to dissent, see 16 Wake Forest L. Rev. 251 (1980).

CASE NOTES

Words Describing Relationships Bear Ordinary Meanings. — In carefully naming the persons who take in cases of intestacy using words describing family relationships such as "parents," "brothers," "sisters," "grandparents," "aunts" and "uncles," the legislature intended that these words bear their ordinary and usual meaning. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

And Cannot Be Expanded. — The words "brother," "parent" and "grandparent" cannot be expanded to include other relationships such as "great-grandfather" or "great uncle." Therefore, the maxim, "Expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate's parents or grandparents. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

Distribution of Estate When Surviving Spouse Dissents from Will. — When a surviving spouse dissents from a will, the intestate share should be allocated so as to cause the least possible disruption of the decedent's plan for the distribution of his estate. In partitioning testatrix's property, her will should be given consideration, and insofar as possible the beneficiaries of the will should receive the property testatrix intended for them to receive. In re Estate of Etheridge, 33 N.C. App. 585, 235 S.E.2d 924, cert. denied, 293 N.C. 253, 237 S.E.2d 535 (1977).

This section does not purport to give a dissenting spouse the right to select the particular property he or she will receive in opposition to the dominant intent expressed in a will. The dominant intent expressed in the will is still controlling so long as it can be carried out and leave the dissenting spouse with the prescribed interest in value in the estate. In re Estate of Etheridge, 33 N.C. App. 585, 235 S.E.2d 924, cert. denied, 293 N.C. 253, 237 S.E.2d 535 (1977).

Stated in Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

Applied in Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979); Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

Cited in Newlin v. Gill, 32 N.C. App. 392, 232 S.E.2d 213 (1977); Harris v. Ashley, 38 N.C. App. 494, 248 S.E.2d 393 (1978).

§ 29-15. Shares of others than surviving spouse.

Legal Periodicals. — For a note discussing the limitation on collateral inheritance in North Carolina, see 14 Wake Forest L. Rev. 1085 (1978).

For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

CASE NOTES

Words Describing Relationships Bear Ordinary Meanings. — In carefully naming the persons who take in cases of intestacy using words describing family relationships such as "parents," "brothers," "sisters," "grandparents," "aunts" and "uncles," the legislature intended that these words bear their ordinary and usual meaning. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

And Cannot Be Expanded. — The words "brother," "parent" and "grandparent" cannot be expanded to include other relationships such as "great-grandfather" or "great uncle." Therefore, the maxim "Expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate's parents or grandparents. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

Applied in Forester v. Marler, 31 N.C. App. 84, 228 S.E.2d 646 (1976); Jernigan v. Stokley, 34 N.C. App. 358, 238 S.E.2d 318 (1977).

Cited in Newlin v. Gill, 32 N.C. App. 392, 232 S.E.2d 213 (1977); Christenbury v. Hedrick, 32 N.C. App. 708, 234 S.E.2d 3 (1977); Harris v. Ashley, 38 N.C. App. 494, 248 S.E.2d 393 (1978); In re Estate of McCoy, 39 N.C. App. 52, 249 S.E.2d 473 (1978).

ARTICLE 3.

Distribution among Classes.

§ 29-16. Distribution among classes.

(b) Brothers and Sisters and Their Lineal Descendants. — If the intestate is survived by brothers and sisters or the lineal descendants of deceased brothers and sisters, their respective shares in the property which they are entitled to take under G.S. 29-15 of this Chapter shall be determined in the following manner:

(1) Brothers and Sisters. — To determine the share of each surviving brother and sister, divide the property by the number of surviving brothers and sisters plus the number of deceased brothers and sisters who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.

(2) Nephews and Nieces. — To determine the share of each surviving nephew or niece by a deceased brother or sister of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving nephews or nieces plus the number of deceased nephews and nieces who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.

(3) Grandnephews and Grandnieces. — To determine the share of each surviving grandnephew or grandniece by a deceased nephew or niece of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving grandnephews and grandnieces plus the number of deceased grandnephews and grandnieces who have left children surviving the intestate.

(4) Great-Grandnephews and Great-Grandnieces. — To determine the share of each surviving child of a deceased grandnephew or grandniece of the intestate, divide equally among the great-grandnephews and great-grandnieces of the intestate any property not taken under the preceding subdivisions of this subsection.

(5) Grandparents and Others. — If there is no one within the fifth degree of kinship to the intestate entitled to take the property under the preceding subdivisions of this subsection, then the intestate's property shall go to those entitled to take under G.S. 29-15(5).

(c) Uncles and Aunts and Their Lineal Descendants. — If the intestate is survived by uncles and aunts or the lineal descendants of deceased uncles and aunts, their respective shares in the property which they are entitled to take under G.S. 29-15 shall be determined in the following manner:

(1) Uncles and Aunts. — To determine the share of each surviving uncle and aunt, divide the property by the number of surviving uncles and aunts plus the number of deceased uncles and aunts who have left children or grandchildren surviving the intestate.

(2) Children of Uncles and Aunts. — To determine the share of each surviving child of a deceased uncle or aunt of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of surviving children of deceased uncles and aunts plus the number of deceased children of deceased uncles and aunts who have left children surviving the intestate.

(3) Grandchildren of Uncles and Aunts. — To determine the share of each surviving child of a deceased child of a deceased uncle or aunt of the intestate, divide equally among the grandchildren of uncles or aunts

of the intestate any property not taken under the preceding subdivisions of this subsection.

(1959, c. 879, s. 1; 1979, c. 107, ss. 2, 3.)

Effect of Amendments. — The 1979 amendment added "To determine the share of each surviving child of a deceased grandnephew or grandniece of the intestate," at the beginning of subdivision (b)(4), added "To determine the share of each surviving child of a deceased child of a deceased uncle or aunt of the intestate," at the beginning of subdivision (c)(3) and substituted "or" for "and" between "uncles" and "aunts" in subdivision (c)(3).

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

CASE NOTES

Applied in Jernigan v. Stokley, 34 N.C. App. 358, 238 S.E.2d 318 (1977).

Cited in House v. White, 35 N.C. App. 124, 240 S.E.2d 489 (1978); Harris v. Ashley, 38 N.C. App. 494, 248 S.E.2d 393 (1978).

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For comment on "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

ARTICLE 5.

Legitimated Children.

§ 29-18. Succession by, through and from legitimated children.

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

ARTICLE 6.

Illegitimate Children.

§ 29-19. Succession by, through and from illegitimate children.

(b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:

(1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;

(2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer

named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors. (1977, c. 375, s. 6; c. 591; c. 757, s. 3.)

Effect of Amendments. — The first 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10(b)" for "G.S. 52-6(c)" in subdivision (2) of subsection (b).

The second 1977 amendment inserted "and the child's lifetime" in two places in subdivision (2) of subsection (b).

The third 1977 amendment, effective as to estates of decedents dying on or after Sept. 1, 1977, substituted "finally adjudged" for "judicially determined" and inserted "G.S. 49-1 through 49-9 or the provisions of" in subdivision (1) of subsection (b).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsection (b) is set out.

Legal Periodicals. — For note on constitutional law and illegitimate's paternal inheritance rights, see 16 Wake Forest L. Rev. 205 (1980).

CASE NOTES

Statute Does Not Violate Equal Protection or Due Process Clauses. — This section and the statutes in pari materia are substantially related to the lawful State interests. They are intended to promote, and are not in violation of the equal protection and due process clauses. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The statutory scheme established by this section and the other statutes referred to herein (§§ 49-14 through 49-16, and § 52-6(c)) does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Interest of State in Inheritance Rights of Illegitimate Children. — By specifying the manner and time in which an illegitimate may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and, (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

This section and the other statutes referred to herein (§§ 49-14 through 49-16), insofar as they provide that an illegitimate child may inherit from its father only if paternity has been acknowledged in writing or finally adjudged in the lifetime of the father and otherwise in accord with those applicable statutes, establish a statutory scheme which bears an evident and substantial relation to the permissible and important interest of the State in providing for the just and orderly disposition of property at death. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

§ 29-21. Share of surviving spouse.

The share of the surviving spouse of an illegitimate intestate shall be the same as provided in G.S. 29-14 for the surviving spouse of a legitimate person. In determining whether the illegitimate intestate is survived by one or more parents as provided in G.S. 29-14(3), any person identified as the father under G.S. 29-19(b)(1) or (b)(2) shall be regarded as a parent. (1959, c. 879, s. 1; 1977, c. 757, s. 1.)

Effect of Amendments. — The 1977 amendment, effective as to estates of decedents dying on or after Sept. 1, 1977, deleted the exceptions from the end of the first sentence and added the second sentence.

CASE NOTES

Words Describing Relationships Bear Ordinary Meanings. — In carefully naming the persons who take in cases of intestacy using words describing family relationships such as "parents," "brothers," "sisters," "grandparents," "aunts" and "uncles," the legislature intended that these words bear their ordinary and usual meaning. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

And Cannot Be Expanded. — The words "brother," "parent" and "grandparent" cannot be expanded to include other relationships such as "great-grandfather" or "great uncle." Therefore, the maxim, "Expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate's parents or grandparents. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

§ 29-22. Shares of others than the surviving spouse.

Those persons surviving the illegitimate intestate, other than the surviving spouse, shall take that share of the net estate provided in G.S. 29-15. In determining whether the illegitimate intestate is survived by one or more parents or their collateral kindred as provided in G.S. 29-15, any person identified as the father under G.S. 29-19(b)(1) or (b)(2) shall be regarded as a parent. (1959, c. 879, s. 1; 1977, c. 757, s. 2.)

Effect of Amendments. — The 1977 amendment, effective as to estates of decedents dying on or after Sept. 1, 1977, rewrote this section.

CASE NOTES

Words Describing Relationships Bear Ordinary Meanings. — In carefully naming the persons who take in cases of intestacy using words describing family relationships such as "parents," "brothers," "sisters," "grandparents," "aunts" and "uncles," the legislature intended that these words bear their ordinary and usual meaning. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

And Cannot Be Expanded. — The words "brother," "parent" and "grandparent" cannot be expanded to include other relationships such as "great-grandfather" or "great uncle." Therefore, the maxim, "Expressio unius est exclusio alterius" (the expression of one thing is the exclusion of another) tends to exclude collateral kin who are not in the parentela of the intestate's parents or grandparents. Newlin v. Gill, 293 N.C. 348, 237 S.E.2d 819 (1977).

ARTICLE 7.

Advancements.

§ 29-23. In general.

CASE NOTES

Applied in Thompson v. Soles, 299 N.C. 484, 263 S.E.2d 599 (1980).

ARTICLE 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

Cross References. — For provision that a decedent's one-half of community property is not subject to the right to elect a life estate under this Article, see § 31C-3.

Legal Periodicals. — For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

Section Preserves Benefits, etc. —

In accord with 1st paragraph in original. See Taylor v. Bailey, 49 N.C. App. 216, 271 S.E.2d 296 (1980), appeal dismissed, — N.C. —, 274 S.E.2d 235 (1981).

This section limits the right of a married person to convey his or her real property free from the elective life estate provided by this section. Taylor v. Bailey, 49 N.C. App. 216, 271 S.E.2d 296 (1980), appeal dismissed, — N.C. —, 274 S.E.2d 235 (1981).

Effect of Inchoate Dower Interest. — An inchoate dower interest is not an estate in land nor a vested interest, but, nevertheless, it acts as an encumbrance upon real property. Taylor v. Bailey, 49 N.C. App. 216, 271 S.E.2d 296 (1980), appeal dismissed, — N.C. —, 274 S.E.2d 235 (1981).

Surviving Spouse Is Given Election, etc. —

A surviving spouse is given this election so as not to be rendered penniless and would elect this option when the estate is small or insolvent. Taylor v. Bailey, 49 N.C. App. 216, 271 S.E.2d 296 (1980), appeal dismissed, — N.C. —, 274 S.E.2d 235 (1981).

Where seller's wife refused to release her dower interest in the subject property, buyer is entitled to specific performance on the contract to convey the property, with an abatement in the purchase price for the value of defendant's wife's dower interest and for rents and profits for the period he was denied possession. Taylor v. Bailey, 49 N.C. App. 216, 271 S.E.2d 296 (1980), appeal dismissed, — N.C. —, 274 S.E.2d 235 (1981).

Chapter 30.

Surviving Spouses.

Article 4.

Year's Allowance.

Part 1. Nature of Allowance.

Sec.
30-15. When spouse entitled to allowance.
30-17. When children entitled to an allowance.

Part 2. Assigned by Magistrate.

Sec.
30-26. When above allowance is in full.

Part 3. Assigned in Superior Court.

30-29. What complaint must show.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.

Cross References. — For provision that a decedent's half of community property is not subject to the surviving spouse's right of dissent under this Article, see § 31C-3.

Legal Periodicals. — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For a note on a surviving spouse's right to dissent, see 16 Wake Forest L. Rev. 251 (1980).

CASE NOTES

Purpose in Allowing Dissent from Will. — The apparent purpose of this section is to deny a surviving spouse a share of the testator's "net estate" when he or she has been adequately provided for by property passing outside the probate estate. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Time as to When Right to Dissent Arises. — Although a surviving spouse's right to dissent may not be established until a mathematical computation of the value of the deceased spouse's estate is made, the right to dissent generally arises as of the date of the death of the deceased spouse or it never arises. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

Assignment of Reason for Dissent Not Required. — The widow in the exercise of the right to dissent from her husband's will is not required to assign any reason therefor. In re Estate of Cox, 32 N.C. App. 765, 233 S.E.2d 926, cert. denied, 292 N.C. 729, 235 S.E.2d 783 (1977).

Intestate Share. —

The "intestate share" of a surviving spouse is the quantum of real and personal property he or she would receive under the provisions of Chapter 29, known as the Intestate Succession Act. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Since the intestate share of any surviving spouse, or other heir, is ordinarily a percentage of the decedent's net estate, the amount of the net estate must be determined within limits which will permit the court to ascertain with substantial accuracy whether the value of the intestate share of the surviving spouse is less or greater than the value of the property passing to her in and outside the will. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

The 1975 amendment which added subdivision (a)(3) of this section did not manifest that General Assembly's intent that the term "intestate share" in subdivision (1) of this section be defined with reference to the consequences of the dissent. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

The term "intestate share," as used in subdivision (a)(1) of this section is clear and unambiguous. That the legislature provides one criterion for determining whether the right to dissent exists and another for determining the consequences of the dissent creates no ambiguity. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

The right to dissent of a "second or successive spouse" was determined by § 30-1(a)(1) without reference to § 30-3(b). Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Prompt Determination of Right to Dissent. — The legislature intended for the right to dissent to be determined as quickly as possible after the dissent is filed. Phillips v.

Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Methods of Determining Values. — The values which must be determined under the statutory procedure can be reasonably ascertained by the use of aids such as tax tables and expert witnesses and the procedure is not constitutionally invalid. The procedure set forth in the statute does not approach that level of arbitrary governmental action necessary to support a claim of denial of due process. In re Estate of Kirkman, 38 N.C. App. 515, 248 S.E.2d 438 (1978), cert. denied, 296 N.C. 584, 254 S.E.2d 31 (1979).

Computation of Net Estate. — Interest and penalties on the federal estate tax should not be considered when computing the "net estate" for the purpose of determining whether a surviving spouse can dissent. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

The federal estate tax is one of the "lawful claims" against testator's estate, and the widow's intestate share of the estate is to be computed after its deduction. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

To ascertain "net estate" under § 29-2(5) it is necessary to subtract from the value of the gross estate, "family allowances, costs of administration, and all lawful claims against the estate." Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Determination Made from Net, Not Gross, Estate. — Subsection (c) does not require intestate share to be determined — for purposes of establishing the right to dissent — from decedent's gross estate valued as of the date of his death rather than from net estate as required by § 29-14(1). Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

In establishing the right of a surviving spouse to dissent pursuant to subdivision (a)(1), the determination of intestate share is based on the value of the decedent's net estate as provided in Chapter 29 of the General Statutes. Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

Right to Dissent Is Mathematically Determined by Value of Property. —

Under subdivision (a)(1) of this section a surviving spouse has a right to dissent only when the total value of property received under and outside the will is less than what he or she would have received had the deceased spouse died intestate. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Where the testator's personal representative and the dissenting spouse, dealing at arm's length are able to agree upon the value of the "net estate," the clerk of the court will ordinarily abide by this agreement in determining the right to dissent. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Plaintiff is entitled to dissent from the will of her late husband upon demonstrating that the aggregate value of the provisions for her benefit under the will, when added to the value of property or interests passing to her in any manner outside the will, is less than her intestate share of his estate. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

The statutory scheme contemplates that the surviving spouse's right of dissent is established by a mathematical computation. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Estimating Value of Net Estate. — The right to dissent should be determined by the clerk whenever, in his judgment, the value of the "net estate" can be estimated with reasonable accuracy, rather than such time as the actual value of the net estate can be ascertained, i.e., at the time of distribution. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

The estimate of the federal estate tax required by subsection (a) of this section is not an estimate of the actual tax which will be paid on the estate but rather an estimate of the tax which would be paid if plaintiff received the share of the "net estate" specified by subdivision (a)(1) of this section, including any marital deduction the estate would receive as a result of her taking that share. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

For purposes of determining whether a surviving spouse may dissent, it is an estimation of the federal estate tax which must be deducted in approximating the "net estate." Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Prior to the time the personal representative files his final account, it will seldom, if ever, be possible to determine with complete accuracy the value of the testator's net estate and the intestate share of the surviving spouse. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Purposes for Which Established Value Binding. — Any determination and establishment of value made as provided in this section is binding only for the purposes of determining whether there is a right of dissent. In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981).

Right to Property after Dissenting Is Not Contingent Right.—Although the right to take property after dissenting from a will must be established, it is not a contingent right. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

The timely and correct filing of a proper dissent constitutes an exercise of the right to dissent and creates a vested property right in the dissenting spouse. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

The dissenting spouse, upon filing dissent to the will, becomes vested, eo instante, as of the date of the testator's death, with title to the intestate share of the testator's realty which is allowed by the statutes providing for dissent. Etheridge v. Etheridge, 41 N.C. App. 44, 255 S.E.2d 729 (1979).

Chapter 29 Governs Intestate Share. — The determination of a surviving spouse's intestate share is governed in the first instance by the "Intestate Succession Act" (Chapter 29 of the General Statutes). Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

Establishment of Right to Dissent When Spouse and Lineal Descendant Survive. — Where the testator is survived by his spouse and a lineal descendant, the right of the surviving spouse to dissent is established by the determination and comparison of two figures: (1) the aggregate value of property passing under the will and outside the will to the surviving spouse; and (2) the intestate share of the surviving spouse. Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

Variance between Valuations and Ultimate Distributive Share. — The language of subsection (c) of this section, which establishes a valuation procedure for the purpose of establishing the right of dissent and mandates that the value so determined be used exclusively for that purpose, indicates that the General Assembly anticipated a variance between this valuation and the ultimate distributive share. Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Rights Devolving after Allocation of Spouse's Share. — The rights devolving after the allocation by the commissioners of the spouse's share after a dissent is analagous to the rights which devolved upon a widow in the allocation of her dower before its abolishment. Etheridge v. Etheridge, 41 N.C. App. 44, 255 S.E.2d 729 (1979).

The act of qualifying as administratrix c.t.a. did not constitute an election to take under the will so as to bar the statutory right of dissent to the will, when at the time of qualification as administratrix c.t.a., the widow was 69 years old, had not communicated with her deceased husband for 18 years, was not accomplished in business affairs on the administration of estates and did not have the assistance of legal counsel. Hurdle v. Sawyer, 46 N.C. App. 814, 266 S.E.2d 404 (1980).

Agreement as to Valuation. — Absent a showing that the parties have failed to act in an arm's length manner, or that the rights of creditors of the estate would be adversely affected thereby, the clerk ought to abide by an agreement as to the valuation of the estate and the testate and intestate shares thereof. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Compliance with Subsection (c). — Where plaintiff filed a dissent to her late husband's will, and the administrator with the will annexed and the other devisees under the will implicitly assented to the wife's valuation of the estate and her testate and intestate shares thereof by conceding her right to dissent from the will, the parties had complied with the provisions of subsection (c) of this section with respect to an agreement as to valuation except for procuring the approval of the clerk of their valuation. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Cited in Moore v. Jones, 44 N.C. App. 578, 261 S.E.2d 289 (1980); In re Estate of Kirkman, 47 N.C. App. 479, 267 S.E.2d 518 (1980).

§ 30-2. Time and manner of dissent.

CASE NOTES

This section is a statute of limitation, etc. —

In accord with 1st paragraph in original. See Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

This section is limitation as to the time when the spouse must dissent and is not conditioned on her right to dissent which may be determined either before or after the estate is appraised pursuant to § 30-1(c). In re Estate of Cox, 32 N.C. App. 765, 233 S.E.2d 926, cert. denied, 292 N.C. 729, 235 S.E.2d 783 (1977).

When Dissent Timely. — So long as the dissent is filed within six months after the issuance of letters testamentary, or extended pursuant to subsection (a), it is timely, regardless of whether the appraisal has been conducted. In re Estate of Cox, 32 N.C. App. 765, 233 S.E.2d 926, cert. denied, 292 N.C. 729, 235 S.E.2d 783 (1977).

Filing Procedure Not Determinative of Right to Dissent. — The filing procedure prescribed by subsection (a) is merely a limitation on the time within which a surviving spouse must note her dissent of record. It is not conditioned upon or determinative of the right to dissent which may not be established until some later date. Phillips v. Phillips, 34 N.C.

App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

A surviving spouse can and, in fact, must file her dissent within the statutory time period even though her right to dissent is not finally established until after the statutory time period has expired due to the necessity of ascertaining "net estate." Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977), rev'd on other grounds, 296 N.C. 590, 252 S.E.2d 761 (1979).

Action For Construction Must Be Filed Before Dissent Where Extension Granted. — Implicit in the extension of time allowed for filing a dissent in cases where litigation that affects the share of the surviving spouse is pending at the expiration of the six-month time period is the requirement that any action for construction of a will be filed before the filing of the notice of dissent. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Dissent Bars Other Actions. — Plaintiff's dissent to her husband's will, which was subject only to an essentially ministerial act by the clerk of court in approving a valuation agreement, precluded her from maintaining an action for construction of the will or claiming property passing under the residuary clause of the will. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Widow May Dissent without Assigning Reason. —

In accord with 1st paragraph in original. See In re Estate of Kirkman, 38 N.C. App. 515, 248 S.E.2d 438 (1978), cert. denied, 296 N.C. 584, 254 S.E.2d 31 (1979).

Notice to Executor of Intentions of Dissenting Spouse. — The giving of notice of dissent to the clerk of superior court under subsection (a) of this section is sufficient to alert the executor with respect to the intentions of the dissenting spouse and afford him ample opportunity to prepare for a hearing on the question of the spouse's statutory right to dissent. In re Estate of Kirkman, 38 N.C. App. 515, 248 S.E.2d 438 (1978), cert. denied, 296 N.C. 584, 254 S.E.2d 31 (1979).

Right to Property after Dissenting Is Not Contingent Right. — Although the right to take property after dissenting from a will must be established, it is not a contingent right. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

The timely and correct filing of a proper dissent constitutes an exercise of the right to dissent and creates a vested property right in the dissenting spouse. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

Applied in Hurdle v. Sawyer, 46 N.C. App. 814, 266 S.E.2d 404 (1980); In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981).

Cited in Taylor v. Taylor, 45 N.C. App. 449, 263 S.E.2d 351 (1980); In re Estate of Kirkman, 47 N.C. App. 479, 267 S.E.2d 518 (1980).

§ 30-3. Effect of dissent.

Legal Periodicals. — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For a note on a surviving spouse's right to dissent, see 16 Wake Forest L. Rev. 251 (1980).

CASE NOTES

The right to dissent of a "second or successive spouse" was determined by § 30-1(a)(1) without reference to § 30-3(b). Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

Right to Property after Dissenting Is Not Contingent Right. — Although the right to take property after dissenting from a will must be established, it is not a contingent right. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

The timely and correct filing of a proper dissent constitutes an exercise of the right to dissent and creates a vested property right in the dissenting spouse. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

Intestate Share Allocated so as to Cause Least Disruption of Decedent's Plan. — When a surviving spouse dissents from a will, the intestate share should be allocated so as to cause the least possible disruption of the decedent's plan for the distribution of his estate. In partitioning testatrix's property, her will should be given consideration, and insofar as possible the beneficiaries of the will should receive the property testatrix tended for them to receive. In re Estate of Etheridge, 33 N.C. App. 585, 235 S.E.2d 924, cert. denied, 293 N.C. 253, 237 S.E.2d 535 (1977).

Applied in Hurdle v. Sawyer, 46 N.C. App. 814, 266 S.E.2d 404 (1980).

Stated in Phillips v. Phillips, 34 N.C. App. 428, 238 S.E.2d 790 (1977).

Cited in Moore v. Jones, 44 N.C. App. 578, 261 S.E.2d 289 (1980).

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.

Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out of the personal property of the deceased spouse, to an allowance of the value of five thousand dollars ($5,000) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c. 499, s. 2; Rev., s. 3091; C. S., s. 4108; 1953, c. 913, s. 1; 1961, c. 316, s. 1; c. 749, s. 1; 1969, c. 14; 1981, c. 413, s. 1.)

Effect of Amendments. — The 1981 amendment, applicable to estates of persons dying on or after May 18, 1981, substituted "five thousand dollars ($5,000)" for "two thousand dollars ($2,000)" near the end of the first sentence.

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

Will Cannot Deprive Surviving Spouse of Allowance. — The General Assembly did not intend that if the testator left a will under the terms of which the surviving spouse received nothing from his personal property, that the spouse was deprived of an allowance. In re Estate of Brown, 40 N.C. App. 61, 251 S.E.2d 905 (1979).

The General Assembly did not intend that if the deceased left a will under the terms of which the surviving spouse received only what she would have received by law as her own property, that the surviving spouse is deprived of an allowance from the deceased's personal property. In re Estate of Brown, 40 N.C. App. 61, 251 S.E.2d 905 (1979).

Where the decedent left a will under the terms of which his surviving spouse did not receive any legacy from his personal property, she could take her allowance out of his personal property, which would not include the proceeds from an insurance policy or her share of a joint bank account. In re Estate of Brown, 40 N.C. App. 61, 251 S.E.2d 905 (1979).

Proceeds from Joint Bank Account Are Not Personal Property of Decedent. — Proceeds from a joint bank account were paid to a surviving spouse under the terms of the contract setting up the account, and were her property and not the "personal property of the deceased spouse." In re Estate of Brown, 40 N.C. App. 61, 251 S.E.2d 905 (1979).

Proceeds from Insurance Policy Are Not Personal Property of Decedent. — Proceeds from an insurance policy were paid to a surviving spouse in accordance with her rights under the insurance contract, and was not the "personal property of the deceased spouse." In re Estate of Brown, 40 N.C. App. 61, 251 S.E.2d 905 (1979).

Cited in Pritchard v. First-Citizens Bank & Trust Co., 38 N.C. App. 489, 248 S.E.2d 467 (1978); Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979).

§ 30-17. When children entitled to an allowance.

Whenever any parent dies leaving any child under the age of 18 years, including an adopted child or a child with whom the widow may be pregnant at the death of her husband, or a child who is less than 22 years of age and is a full-time student in any educational institution, or a child under 21 years of age who has been declared mentally incompetent, or a child under 21 years of age who is totally disabled, or any other person under the age of 18 years residing with the deceased parent at the time of death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides its share of the estate of such deceased parent, to an allowance of one thousand dollars ($1,000) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from any lien by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within 10 days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a magistrate, upon application of said guardian or next friend.

If the child resides with the widow of the deceased parent at the time such allowance is paid, the allowance shall be paid to said widow for the benefit of said child. If the child resides with its surviving parent who is other than the widow of the deceased parent, such allowance shall be paid to said surviving parent for the use and benefit of such child, regardless of whether the deceased died testate or intestate or whether the widow dissented from the will. Provided, however, the allowance shall not be available to an illegitimate child of a deceased father, unless such deceased father shall have recognized the paternity of such illegitimate child by deed, will or other paper-writing. If the child does not reside with a parent when the allowance is paid, it shall be paid to its general guardian, if any, and if none, to the clerk of the superior court who shall receive and disburse same for the benefit of such child. (1889, c. 496; Rev., s. 3094; C. S., s. 4111; 1939, c. 396; 1953, c. 913, s. 2; 1961, c. 316, s. 2; c. 749, s. 3; 1969, c. 269; 1971, c. 528, s. 22; 1973, c. 1411; 1975, c. 259; 1981, c. 413, s. 2; c. 599, s. 7.)

Effect of Amendments. — The first 1981 amendment, applicable to estates of persons dying on or after May 18, 1981, substituted "one thousand dollars ($1,000)" for "six hundred dollars ($600.00)" near the end of the first sentence in the first paragraph.

The second 1981 amendment, effective Oct. 1, 1981, substituted "full-time student in any educational institution" for "full-time college student" near the beginning of the first sentence of the first paragraph. Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

Part 2. Assigned by Magistrate.

§ 30-26. When above allowance is in full.

If the estate of a deceased be insolvent, or if his personal estate does not exceed five thousand dollars ($5,000), the allowances for the year's support of the surviving spouse and the children shall not, in any case, exceed the value prescribed in G.S. 30-15 and 30-17; and the allowances made to them as above prescribed shall preclude them from any further allowances. (1868-9, c. 93, s. 19; Code, s. 2127; Rev., s. 3103; C. S., s. 4120; 1961, c. 749, s. 10; 1981, c. 413, s. 3.)

Effect of Amendments. — The 1981 amendment, applicable to estates of persons dying on or after May 18, 1981, substituted "five thousand dollars ($5,000)" for "two thousand dollars ($2,000)."

Part 3. Assigned in Superior Court.

§ 30-27. Surviving spouse or child may apply to superior court.

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

CASE NOTES

Cited in In re Estate of Kirkman, 38 N.C. App. 515, 248 S.E.2d 438 (1978).

§ 30-29. What complaint must show.

In the complaint the plaintiff shall set forth, besides the facts entitling plaintiff to a year's support and the value of the support claimed, the further facts that the estate of the decedent is not insolvent, and that the personal estate of which he died possessed exceeded five thousand dollars ($5,000), and also whether or not an allowance has been made to plaintiff and the nature and value thereof. (1868-9, c. 93, s. 22; Code, s. 2130; Rev., s. 3106; C. S., s. 4123; 1961, c. 749, s. 12; 1981, c. 413, s. 4.)

Effect of Amendments. — The 1981 amendment, applicable to estates of persons dying on or after May 18, 1981, substituted "five thousand dollars ($5,000)" for "two thousand dollars ($2,000)" near the end of the section.

§ 30-31. Duty of commissioners; amount of allowance.

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

CASE NOTES

Meaning of Annual Net Income. — "Net income" in this section is not "adjusted gross income," but rather is to be computed after deducting all federal and state income taxes attributable to the income received by the decedent during the three years preceding his death. Pritchard v. First-Citizens Bank & Trust Co., 38 N.C. App. 489, 248 S.E.2d 467 (1978).

Net income in this section means "take home pay" or "after-tax income," because this is the only income that is "netted," that is truly available for family support purposes in a real sense, as any employee whose earnings are subject to withholding can testify. Pritchard v. First-Citizens Bank & Trust Co., 38 N.C. App. 489, 248 S.E.2d 467 (1978).

Allowance May Be Less than Prescribed Maximum. — The formula in this section serves only to calculate the maximum allowance which may be assigned and does not represent an amount which must be assigned. The only requirement laid down by this section is that the allowance be, within the maximum limit specified, "a value sufficient for the support of plaintiff according to the estate and condition of the decedent." In some cases, this amount could be considerably less than the statutorily prescribed maximum. Pritchard v. First-Citizens Bank & Trust Co., 38 N.C. App. 489, 248 S.E.2d 467 (1978).

Sufficient Allowance to Maintain Standard of Living. — This section is designed to permit the allowance to the surviving spouse of a solvent decedent of an amount sufficient to maintain for a period that standard of living to which he or she had been accustomed, thereby avoiding the hardship which an immediate and drastic reduction in income would entail. Pritchard v. First-Citizens Bank & Trust Co., 38 N.C. App. 489, 248 S.E.2d 467 (1978).

The purpose of the larger allowance authorized by Part 3 of Article 4 of Chapter 30 appears to be to provide the surviving spouse of a solvent decedent with a level of support commensurate with the support which he or she would have had from the deceased spouse during the first year after the spouse's death had the death not occurred. Pritchard v. First-Citizens Bank & Trust Co., 38 N.C. App. 489, 248 S.E.2d 467 (1978).

The lesiglature by this section intended the widow to receive an allotment not exceeding one half of the income which would probably have been actually received by and available to her deceased husband for the support of his family, had he lived an additional year. Pritchard v. First-Citizens Bank & Trust Co., 38 N.C. App. 489, 248 S.E.2d 467 (1978).

Chapter 31.

Wills.

Article 2.

Revocation of Will.

Sec.

31-5.4. Revocation by divorce.

Article 4.

Depository for Wills.

31-11.1 to 31-11.5. [Reserved.]

Article 4A.

Self-Proved Wills.

31-11.6. How attested wills may be made self-proved.

Article 5.

Probate of Will.

31-18.1. Manner of probate of attested written will.

Sec.

31-24. Examination of witnesses before notary public.

31-25.1. Proof by certified photographic copy of original will.

31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.

Article 7.

Construction of Will.

31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

ARTICLE 1.

Execution of Will.

§ 31-1. Who may make will.

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

§ 31-3.2. Kinds of wills.

Legal Periodicals. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

§ 31-3.3. Attested written will.

CASE NOTES

Cited in In re Will of Weston, 38 N.C. App. 564, 248 S.E.2d 359 (1978).

§ 31-4. Execution of power of appointment by will.

CASE NOTES

Stated in First Union Nat'l Bank v. Moss, 32 N.C. App. 499, 233 S.E.2d 88 (1977).

ARTICLE 2.

Revocation of Will.

§ 31-5.3. Will not revoked by marriage; dissent from will made prior to marriage.

Legal Periodicals. — For survey of 1973 case law on the revocation of wills by subsequent marriage, see 52 N.C.L. Rev. 949 (1974).

§ 31-5.4. Revocation by divorce.

Dissolution of marriage by absolute divorce after making a will does not revoke the will of any testator but, unless otherwise specifically provided in the will, it revokes all provisions in the will in favor of the testator's spouse so divorced, including, but not by way of limitation, the appointment of such spouse as executor or executrix. (1953, c. 1098, s. 6; 1977, c. 74, s. 3.)

Efect of Amendments. — The 1977 amendment, effective July 1, 1977, inserted "unless otherwise specifically provided in the will."

Session Laws 1977, c. 74, s. 5, provides: "This act shall not affect pending litigation."

§ 31-5.5. After-born or after-adopted child; illegitimate child; effect on will.

CASE NOTES

Stated in Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

§ 31-5.8. Revival of revoked will.

Legal Periodicals. — For survey of 1973 case law on the revocation of wills by subsequent marriage, see 52 N.C.L. Rev. 949 (1974).

ARTICLE 4.

Depository for Wills.

§§ 31-11.1 to 31-11.5: Reserved for future codification purposes.

ARTICLE 4A.

Self-Proved Wills.

§ 31-11.6. How attested wills may be made self-proved.

(a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

"I, ..., the testator, sign my name to this instrument this . . . day of . . . ., 19. . . and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

. . . .
Testator

We . . . ., ..., the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

. . . .
Witness

. . . .
Witness

THE STATE OF . . . .
COUNTY OF . . . .

Subscribed, sworn to and acknowledged before me by . . . . the testator and subscribed and sworn to before me by . . . . and . . . ., witnesses, this . . . . . . day of . . . .

(SEAL)

(SIGNED) . . . .
. . . .
(OFFICIAL CAPACITY OF OFFICER)"

(b) An attested written will executed as provided by G.S. 31-3.3 may at any time subsequent to its execution be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

"STATE OF NORTH CAROLINA
"COUNTY/CITY OF . . . .

"Before me, the undersigned authority, on this day personally appeared . . . ., and . . . ., known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn. The testator, declared to me and to the witnesses in my presence: That said instrument is his last will; that he had willingly signed or directed another to sign the same for him, and executed it in the presence of said witnesses as his free and voluntary act for the purposes therein expressed; or, that the testator signified that the instrument was his instrument by acknowledging to them his signature previously affixed thereto.

The said witnesses stated before me that the foregoing will was executed and acknowledged by the testator as his last will the presence of said witnesses who, in his presence and at his request, subscribed their names thereto as attesting witnesses and that the testator, at the time of the execution of said will, was over the age of 18 years.and of sound and disposing mind and memory.

. . . .
Testator

. . . .
Witness

. . . .
Witness

. . . .
Witness

Subscribed, sworn and acknowledged before me by . . . ., the testator, subscribed and sworn before me by . . . ., ... and . . . . witnesses, this . . . day of . . . . . ., A.D. . . . .

(SEAL)

SIGNED . . . .

. . . .
(OFFICIAL CAPACITY OF OFFICER)"

(c) The sworn statement of any such witnesses taken as herein provided shall be accepted by the court as if it had been taken before such court. (1977, c. 795, s. 1; 1979, c. 536, s. 1; 1981, c. 599, s. 8.)

Editor's Note. — Session Laws 1977, c. 795, s. 4, makes this Article effective Oct. 1, 1977.

Session Laws 1977, c. 795, s. 3, provides: "This act shall apply to any attested written will in existence on or executed after the effective date of this act."

Effect of Amendments. — The 1979 amendment, effective Oct. 1, 1979, designated the former provisions of the section as subsections (b) and (c) and added subsection (a). In subsection (b), the amendment substituted "any time subsequent to its execution" for "the time of its execution or at any subsequent date" near the beginning of the introductory paragraph.

The 1981 amendment, effective Oct. 1, 1981, substituted "Any" for "In addition to the procedures for the execution of a will set out in G.S. 31-3.3, any" at the beginning of subsection (a).

Session Laws 1979, c. 536, s. 2, effective May 9, 1979, provides: "The execution of an acknowledgment of a will by a testator, and of the affidavits of witnesses, made before an officer authorized to administer oaths under the laws of this State and evidenced by the officer's certificate substantially in the form set out in G.S. 31-11.6 during the period between October 1, 1977 and October 1, 1979 shall be considered to be a valid execution and attestation of a written will even though the will was not signed and attested under the provisions of G.S. 31-3.3 separately from the execution of the acknowledgment by the testator and the affidavits of the witnesses. Such wills may be probated in accordance with G.S. 31-18.1(a)(4)."

Session Laws 1981, c. 599, s. 9, provides: "The execution of an acknowledgment of a will by a testator, and of the affidavits of witnesses, made before an officer authorized to administer oaths under the laws of this State and evidenced by the officer's certificate substantially in the form set out in G.S. 31-11.6 if done during the period between October 1, 1979, and the effective date of this act, shall be considered to be a valid execution and attestation of a written will regardless of whether or not the will was signed and attested under the provisions of G.S. 31-3.3 separately from the execution of the acknowledgment by the testator and the affidavits of the witnesses. Such wills may be probated in accordance with G.S. 31-18.1(a)(4)."

Session Laws 1981, c. 599 s. 21, provides that the act shall affect pending litigation.

Legal Periodicals. — For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

ARTICLE 5.

Probate of Will.

§ 31-15. Clerk may compel production of will.

CASE NOTES

Applied in In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

§ 31-18.1. Manner of probate of attested written will.

(a) An attested written will, executed as provided by G.S. 31-3.3, may be probated in the following manner:

(1) Upon the testimony of at least two of the attesting witnesses; or
(2) If the testimony of only one attesting witness is available, then
  a. Upon the testimony of such witness, and
  b. Upon proof of the handwriting of at least one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and
  c. Upon proof of the handwriting of the testator, unless he signed by his mark, and
  d. Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will; or
(3) If the testimony of none of the attesting witnesses is available, then
  a. Upon proof of the handwriting of at least two of the attesting witnesses whose testimony is unavailable, and
  b. Upon compliance with paragraphs c and d of subsection (a)(2) of this section; or
(4) Upon a showing that the will has been made self-proved in accordance with the provisions of G.S. 31-11.6.

(1977, c. 795, s. 2; 1979, c. 107, s. 4.)

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, added subdivision (4) to subsection (a). Session Laws 1977, c. 795, s. 3, provides: "This act shall apply to any attested written will in existence on or executed after the effective date of this act."

The 1979 amendment substituted semicolons for periods and added "or" at the end of paragraphs (2)d and (3)b.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsection (a) is set out.

Legal Periodicals. — For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

No Requirement that Witness Be Able to See Will. — Subdivision (a)(1) of this section requires only that an attested will be probated "upon the testimony of at least two of the attesting witnesses." It does not require that the witness be able to see the will and the signatures on it at the time of the caveat proceeding in order that he may give testimony to prove it. In re Will of Weston, 38 N.C. App. 564, 248 S.E.2d 359 (1978).

A witness who had become blind by the time of the caveat proceeding, but who had full use of his ocular capacity at the time the testator executed the document and at the time it was probated in common form did not come within any of the definitions of "unavailable" in subsection (c) of this section. In re Will of Weston, 38 N.C. App. 564, 248 S.E.2d 359 (1978).

Whether or not the witness by virtue of his blindness at the time of the caveat proceeding was "unavailable," was a question of law to be decided by the judge. In re Will of Weston, 38 N.C. App. 564, 248 S.E.2d 359 (1978).

§ 31-24. Examination of witnesses before notary public.

The examination of witnesses to a will may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside without regard to whether or not the will has been filed for probate in that county. The affidavits, so taken and subscribed, shall be transmitted by the notary public under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath. (1917, c. 183; C.S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A; 1979, c. 226, s. 1.)

Effect of Amendments. — The 1979 amendment rewrote the former first sentence as the present first and second sentences. The principal changes were to make the section, which formerly applied only to nonresident witnesses, applicable to all witnesses, and to eliminate provisions for subscribing the affidavit before the clerk of superior court.

Session Laws 1979, c. 226, s. 3, provides: "Nothing herein contained shall affect pending litigation."

§ 31-25.1. Proof by certified photographic copy of original will.

Whenever the attesting witnesses, or any of them, are nonresidents of the county in which the original will is offered for probate, but are residents of this State, proof of their signatures as attesting witnesses may be taken by the clerk of superior court of the county of residence of the said witnesses, upon receipt of a commission to do so through use of a photographic copy of the original will certified to be a true and exact copy thereof by the clerk of the county in which the will is to be probated. The clerk of the county of residence of such witnesses shall take the deposition of such witnesses, and, upon return of the commission and depositions to the clerk of court in which the will is to be probated, the said clerk shall adjudge the will to be duly proved thereon as if the witnesses had appeared in person before him. (1979, c. 784.)

§ 31-27. Certified copy of will of nonresident recorded.

CASE NOTES

Cited in In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980).

§ 31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.

Whenever any last will and testament has been probated, based upon the examination of the subscribing witness or the subscribing witnesses, taken before a notary public in the county in which the will is probated, or taken before a notary public of any other county, it is hereby in all respects validated and shall be sufficient to pass the title to all real and personal property purported to be transferred thereby.

All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probate of any wills, deeds and other instruments required or permitted by law to be recorded, are hereby validated. Nothing herein contained shall affect pending litigation. (1945, c. 822; 1973, c. 445; 1977, c. 734, s. 1; 1979, c. 226, s. 2.)

Effect of Amendments. — The 1977 amendment reenacted this section without change.

Session Laws 1977, c. 734, s. 2, provides that nothing contained in the act shall affect pending litigation.

Session Laws 1977, c. 734, s. 3, provides: "This act shall become effective upon ratification [June 24, 1977] and shall apply only to those acts performed on or before May 15, 1977.

Session Laws 1979, c. 226, s. 2, reenacted this section without change.

Session Laws 1979, c. 226, s. 3, provides: "Nothing herein contained shall affect pending litigation."

Session Laws 1979, c. 226, s. 4, provides: "Section 2 of this act shall apply only to those acts performed on or before the effective date of this act." The act was ratified March 29, 1979 and made effective on ratification.

ARTICLE 6.

Caveat to Will.

§ 31-32. When and by whom caveat filed.

CASE NOTES

When Caveat Properly Entered. — Where a certified or authenticated copy or exemplification of a will of a nonresident together with the proceedings had in connection with its probate in another state is allowed, filed and recorded by the clerk of superior court in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk, a caveat to the will may be properly entered. In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980).

A caveat to a will may be filed, etc. — The general rule is that a contestant under this section must have some pecuniary or beneficial interest in the estate that is detrimentally affected by the will. In re Will of Calhoun, 47 N.C. App. 472, 267 S.E.2d 385, cert. denied, 301 N.C. 90, 273 S.E.2d 311 (1980).

Time Limitation Is Substantive. — The time limitation contained in this section has been held to be a "substantive" limitation on the right of action. In re Evans, 46 N.C. App. 72, 264 S.E.2d 387 (1980).

Only Extrinsic Fraud Tolls Period of Limitation. — The general rule is that when a statute creating the right to contest a will and imposing a limitation of time therefor is construed as affixing an inseparable condition to the exercise of the right, that period so limited will not be tolled by fraud other than extrinsic fraud which would vitiate the probate proceeding. In re Evans, 46 N.C. App. 72, 264 S.E.2d 387 (1980).

A contest not timely instituted based on other than extrinsic fraud is wholly barred although by reason of the wrongful conduct of the propounder, the contestants were not apprised of the situation soon enough to comply with the limitation requirement. In re Evans, 46 N.C. App. 72, 264 S.E.2d 387 (1980).

Instrinsic And Extrinsic Fraud Distinguished. — The question of fraud in obtaining the execution of a will, undue influence, forgery, and the like may be submitted to the probate court in a direct attack on the will by caveat. Fraud of this nature is intrinsic fraud. Extrinsic fraud, on the other hand, relates to the manner in which the judgment is procured. It must relate to matters not in issue and prevent a real contest in the trial. In re Evans, 46 N.C. App. 72, 264 S.E.2d 387 (1980).

Question of Whether Cause Barred as Matter of Law. — While ordinarily whether a cause is barred by the apposite statute of limitations is a mixed question of law and fact, where the facts are admitted or established, the question of the bar of the applicable statute pleaded becomes a question of law, and when such facts disclose that the action is barred the court may sustain the plea and dismiss the action. In re Evans, 46 N.C. App. 72, 264 S.E.2d 387 (1980).

Applied in In re Will of Joyner, 35 N.C. App. 666, 242 S.E.2d 213 (1978).

§ 31-33. Bond given and cause transferred to trial docket.

CASE NOTES

Cited in In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980).

§ 31-36. Caveat suspends proceedings under will.

CASE NOTES

Cited in In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980).

ARTICLE 7.

Construction of Will.

§ 31-38. Devise presumed to be in fee.

CASE NOTES

Section Changes Common-Law Rule. — This section merely changed the common-law rule that a devise without words of perpetuity or limitation conveyed a life estate only. Thompson v. Ward, 36 N.C. App. 593, 244 S.E.2d 485, cert. denied, 295 N.C. 556, 248 S.E.2d 735 (1978).

Devise of Use of Property. — Where testatrix only devised the "use of" the property so long as the beneficiaries "wish to live there," she "in plain and express words" showed an intent to devise less than the fee. While the courts have held that the devise of the "use of" property is the equivalent of a devise in fee, the rule has no application, when the will shows an intent to pass an interest that is less than a fee. Thompson v. Ward, 36 N.C. App. 593, 244 S.E.2d 485, cert. denied, 295 N.C. 556, 248 S.E.2d 735 (1978).

Rules of Construction — Intention of Testator. —

In accord with 1st paragraph in original. See Wing v. Wachovia Bank & Trust Co., 301 N.C. 456, 272 S.E.2d 90 (1980).

Applied in Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980).

§ 31-40. What property passes by will.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

CASE NOTES

Where a will is susceptible to, etc. — In accord with original. See Wing v. Wachovia Bank & Trust Co., 301 N.C. 456, 272 S.E.2d 90 (1980).

§ 31-41. Will relates to death of testator.

CASE NOTES

Exception to General Rule. — Although this section ordinarily requires that a will be construed as though executed immediately prior to the testator's death, this section will not be applied in a blind or mechanical manner and that other appropriate factors may be considered. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

Construction of Will as to Identity of Devisee or Legatee. — In accord with original. See Palmer v. Ketner, 29 N.C. App. 187, 223 S.E.2d 913 (1976).

Effect of Mental Incompetence on Testamentary Capacity. — A will generally reflects the testator's testamentary intent as of the date of his death. When a person becomes mentally incompetent, however, that person ceases to be able to form testamentary intent. In such cases, it would defy reason to hold that a testator's will reflected his testamentary intent as of the date of his death, even though it had been legally determined that the testator was incapable of forming a testamentary intent for many years prior to that date. Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979).

§ 31-42. Failure of devises and legacies by lapse or otherwise; renunciation.

(c) Devolution of void, revoked, or lapsed devises or legacies. — If subsections (a) and (b) above are not applicable and if a contrary intent is not indicated by the will:

(1) Where a devise or legacy of any interest in property is void, is revoked, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass:
  a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or
  b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and

(2) Where a residuary devise or legacy is void, revoked, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto.

(1979, c. 525, s. 5.)

Effect of Amendments. — The 1979 amendment deleted "Renounced" following "Revoked," in the catchline to subsection (c) and deleted "renounced" following "revoked," in the introductory paragraph in subdivision (1) and near the beginning of subdivision (2) of subsection (c).

Session Laws 1979, c. 525, s. 12, provides that the amendment shall not affect pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Legal Periodicals. — For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

CASE NOTES

Devise Void for Vagueness of Description. — Where a testator attempted to devise to named devisees separate tracts of land described simply as, first, "my home and 30 acres of land surrounding the same," second, "12 acres of my Plantation located in the Northwest corner of same," and third, "12 acres on the East side of my Plantation," a fourth item which attempted to devise the "remainder of my real estate" constituted an attempted specific devise of a particular tract, rather than a general residuary clause, and, the first three items being void for vagueness of description, the fourth item was also void. Taylor v. Taylor, 45 N.C. App. 449, 263 S.E.2d 351, rev'd on other grounds, 301 N.C. 357, 271 S.E.2d 506 (1980).

Applied in Forester v. Marler, 31 N.C. App. 84, 228 S.E.2d 646 (1976); Tighe v. Michal, 41 N.C. App. 15, 254 S.E.2d 538 (1979); Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

§ 31-43. General gift by will an execution of power of appointment.

Legal Periodicals. — For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

CASE NOTES

Residuary Devise Executes Power, etc. — This section creates a statutory presumption in favor of exercise of a power of appointment by a residuary clause, and on its face bars any other result unless an intention contrary to exercise can be inferred from the will. Planters Nat'l Bank & Trust Co. v. United States, 425 F. Supp. 1179 (E.D.N.C. 1977).

Stated in First Union Nat'l Bank v. Moss, 32 N.C. App. 499, 233 S.E.2d 88 (1977).

Chapter 31A.

Acts Barring Property Rights.

Article 3.

Willful and Unlawful Killing of Decedent.

Sec.

31A-5. Entirety property.

Article 4.

General Provisions.

Sec.

31A-14. Uniform Simultaneous Death Act not applicable.

ARTICLE 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

Legal Periodicals. — For a note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

Legal Periodicals. — For a note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

Legal Periodicals. — For a note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

Legal Periodicals. — For a note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

§ 31A-5. Entirety property.

Where the slayer and decedent hold property as tenants by the entirety, one half of the property shall pass upon the death of the decedent to the decedent's estate, and the other one half shall be held by the slayer during his or her life, subject to pass upon the slayer's death to the slain decedent's heirs or devisees as defined in G.S. 28A-1-1. (1961, c. 210, s. 1; 1979, c. 572.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section, which formerly read: "Where the slayer and decedent hold property as tenants by the entirety: (1) If the wife is the slayer, one half of the property shall pass upon the death of the husband to his estate, and the other one half shall be held by the wife during her life, subject to pass upon her death to the estate of the husband; and (2) If the husband is the slayer, he shall hold all of the property during his life subject to pass upon his death to the estate of the wife."

Legal Periodicals. — For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

§ 31A-11. Insurance benefits.

Legal Periodicals. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

ARTICLE 4.

General Provisions.

§ 31A-13. Record determining slayer admissible in evidence.

Legal Periodicals. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

§ 31A-14. Uniform Simultaneous Death Act not applicable.

The Uniform Simultaneous Death Act, G.S. 28A-24-1 through G.S. 28A-24-7, shall not apply to cases governed by this Chapter. (1961, c. 210, s. 1; 1979, c. 107, s. 5.)

Effect of Amendments. — The 1979 amendment substituted "G.S. 28A-24-1 through G.S. 28A-24-7" for "G.S. 28-161.1 through G.S. 28-161.7."

§ 31A-15. Chapter to be broadly construed.

Legal Periodicals. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

CASE NOTES

This chapter preserved the common law, etc. — In accord with 2nd paragraph in original. See Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

Chapter 31B.

Renunciation of Transfers by Will, Intestacy, Appointment or Insurance Contract Act.

Sec.
31B-2. Time and place of filing renunciation.
31B-3. Effect of renunciation.

§ 31B-2. Time and place of filing renunciation.

(a) An instrument renouncing a present interest shall be filed within the time period required under the applicable federal statute for a renunciation to be given effect for federal estate tax purposes. If there is no such federal statute the instrument shall be filed not later than seven months after the death of the decedent or donee of the power.

(1979, c. 525, s. 7.)

Effect of Amendment. — The 1979 amendment added the present first sentence of subsection (a) and substituted "If there is no such federal statute the instrument" for "An instrument renouncing a present interest shall be filed" at the beginning of the present second sentence of subsection (a).

Session Laws 1979, c. 525, s. 12, provides that the amendment shall not affect pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

§ 31B-3. Effect of renunciation.

(a) Unless the decedent or donee of the power has otherwise provided in the instrument creating the interest, the property or interest renounced devolves as if the renouncer had predeceased the decedent or, if the renouncer is designated to take under a power of appointment exercised by a testamentary instrument, as if the renouncer had predeceased the donee of the power. A future interest that takes effect in possession or enjoyment after the termination of the estate or interest renounced takes effect as if the renouncer had predeceased the decedent or the donee of the power. A renunciation relates back for all purposes to the date of the death of the decedent or the donee of the power.

(b) In the event that the property or interest renounced was created by testamentary disposition, the devolution of the property or interest renounced shall be governed by G.S. 31-42(a) and (b) notwithstanding that in fact the renouncer has not actually died before the testator. (1975, c. 371, s. 1; 1979, c. 525, s. 6.)

Effect of Amendment. — The 1979 amendment designated the former provisions of this section as subsection (a) and added subsection (b).

Session Laws 1979, c. 525, s. 12, provides that the amendment shall not affect pending litigation.

Chapter 31C.

Uniform Disposition of Community Property Rights at Death Act.

Sec.
31C-1. Application.
31C-2. Rebuttable presumptions.
31C-3. Disposition of community property upon death.
31C-4. Perfection of title of surviving spouse.
31C-5. Perfection of title of personal representative, heir or devisee; duty of personal representative.
31C-6. Written demand.
31C-7. Purchaser for value or lender.
31C-8. Creditors' rights.
31C-9. Severing or altering of married persons.
31C-10. Limitations on testamentary disposition.
31C-11. Uniformity of application and construction.
31C-12. Short title.

§ 31C-1. Application.

This Chapter applies to the disposition at death of the following property acquired by a married person:

(1) All personal property, wherever situated:
  a. Which was acquired as or became, and remained, community property under the laws of another jurisdiction; or
  b. All or the proportionate part of that property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, that community property; or
  c. Traceable to that community property;

(2) All or the proportionate part of any real property situated in this State which was acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property. (1981, c. 882, s. 1.)

Editor's Note. — Session Laws 1981, c. 882, s. 2, provides: "This act shall become effective upon ratification and shall apply to the disposition of property of persons dying on or after the effective date." The act was ratified July 8, 1981.

§ 31C-2. Rebuttable presumptions.

In determining whether this Chapter applies to specific property the following rebuttable presumptions apply:

(1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which this Chapter applies; and

(2) Real property situated in this State and personal property wherever situated, acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which this Chapter applies. (1981, c. 882, s. 1.)

§ 31C-3. Disposition of community property upon death.

Upon death of a married person, one half of the property to which this Chapter applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this State. One half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this State. With respect to property to which this Chapter applies, the one half of the property of the decedent is not subject to the surviving spouse's right to dissent from the will under the provisions of Article 1 of Chapter 30, and is not subject to the right to elect a life estate under the provisions of Article 8 of Chapter 29. (1981, c. 882, s. 1.)

§ 31C-4. Perfection of title of surviving spouse.

If the title to any property to which this Chapter applies was held by the decedent at the time of death, or by a trustee of a revocable inter vivos trust created by the decedent, title of the surviving spouse may be perfected by an order of the clerk of superior court who appointed the decedent's personal representative or by execution of an instrument by the personal representative or the heirs or devisees of the decedent with the approval of the said clerk. Neither the personal representative nor the court in which the decedent's estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which this Chapter applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest. (1981, c. 882, s. 1.)

§ 31C-5. Perfection of title of personal representative, heir or devisee; duty of personal representative.

If the title to any property to which this Chapter applies is held by the surviving spouse at the time of the decedent's death, the personal representative or an heir or devisee of the decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which this Chapter applies, unless a written demand is made by an heir, devisee, or creditor of the decedent. (1981, c. 882, s. 1.)

§ 31C-6. Written demand.

(a) Written demand in this Chapter shall be made by a surviving spouse, the spouse's successor in interest, or the decedent's heirs or devisees not later than six months after the decedent's will has been admitted to probate, or not later than six months after the appointment of an administrator if there is no will, or not later than six months after the decedent's death if the property to which this Chapter applies is held in an inter vivos trust created by the decedent; and written demand by a creditor of the decedent shall be made within the period for presentation of a claim against the decedent's estate as set out in Article 19 of Chapter 28A.

(b) Written demand in this Chapter shall be delivered in person or by registered mail to the personal representative. As used in this Chapter, the personal representative may also mean the trustee of an inter vivos trust created by the decedent who has legal title to, or possession of, the property to which this Chapter applies. (1981, c. 882, s. 1.)

§ 31C-7. Purchaser for value or lender.

(a) If a surviving spouse has apparent title to property to which this Chapter applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the personal representative or an heir or devisee of the decedent.

(b) If a personal representative or an heir or devisee of the decedent has apparent title to property to which this Chapter applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse.

(c) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(d) The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser for value or a lender. (1981, c. 882, s. 1.)

§ 31C-8. Creditors' rights.

This Chapter does not affect rights of creditors with respect to property to which this Chapter applies. (1981, c. 882, s. 1.)

§ 31C-9. Severing or altering of married persons.

This Chapter does not prevent married persons from severing or altering their interests in property to which this Chapter applies. (1981, c. 882, s. 1.)

§ 31C-10. Limitations on testamentary disposition.

This Chapter does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person. (1981, c. 882, s. 1.)

§ 31C-11. Uniformity of application and construction.

This Chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among those states which enact it. (1981, c. 882, s. 1.)

§ 31C-12. Short title.

This Chapter may be cited as the Uniform Disposition of Community Property Rights at Death Act. (1981, c. 882, s. 1.)

Chapter 32.

Fiduciaries.

Article 1.

Uniform Fiduciaries Act.

Sec.
32-4. [Repealed.]

Article 3.

Powers of Fiduciaries.

32-27. Powers which may be incorporated by reference in trust instrument.

Article 4.

Restrictions on Exercise of Power for Fiduciary's Benefit.

32-35 to 32-49. [Reserved.]

Article 5.

Compensation.

Sec.
32-50. Compensation.
32-51. Counsel fees allowable to attorneys serving as fiduciaries.
32-52. Applicability.

ARTICLE 1.

Uniform Fiduciaries Act.

§ 32-1. Short title.

CASE NOTES

Purpose of Act. — The purpose of the Uniform Fiduciaries Act was to relax the common law standard of care owed by banks to principals when dealing with their fiduciaries. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

§ 32-2. Definition of terms.

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C. L. Rev. 629 (1980).

CASE NOTES

"Good Faith." — By defining "good faith" in subsection (b) of this section in terms of an act done honestly although perhaps negligently, the drafters of the act implicitly revealed their intention that the term "bad faith" requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

§ 32-4: Repealed by Session Laws 1977, c. 814, s. 8, effective January 1, 1978.

§ 32-9. Deposit in name of principal.

CASE NOTES

Distinction between Negligence and Bad Faith. — The distinction between negligence and bad faith is that bad faith, or dishonesty, is, unlike negligence, willful. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

A showing of mere negligence is clearly not sufficient to establish "bad faith." Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

The mere failure to make inquiry, even though there be suspicious circumstances, does not constitute bad faith, unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction, — that is to say, where there is an intentional closing of the eyes or stopping of the ears. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

By defining "good faith" in § 32-2(b) in terms of an act done honestly although perhaps negligently, the drafters of the act implicitly revealed their intention that the term "bad faith" requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

ARTICLE 3.

Powers of Fiduciaries.

§ 32-26. Incorporation by reference of powers enumerated in § 32-27; restriction on exercise of such powers.

CASE NOTES

Cited in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

§ 32-27. Powers which may be incorporated by reference in trust instrument.

The following powers may be incorporated by reference as provided in G.S. 32-26.

(29) Apportion and Allocate Receipts and Expenses. — Where not otherwise provided by the Principal and Income Act of 1973, as contained in Chapter 37 of the General Statutes, to determine:

- a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;
- b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and

c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(1977, c. 30.)

Effect of Amendments. — The 1977 amendment substituted "Principal and Income Act of 1973" for "Uniform Principal and Income Act" in the introductory language in subdivision (29).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (29) are set out.

CASE NOTES

Sale of Real Property Devised to Testator's Son. — Where a will granted the executor all of the power set forth in this section, neither the will nor this section gave the executor the authority to sell real property devised to the testator's minor son without prior court approval, since the title to the real property vested in the devisee son upon the testator's death, and the executor did not "hold" the property and it was not "at his disposal" within the meaning of this section. See Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

ARTICLE 4.

Restrictions on Exercise of Power for Fiduciary's Benefit.

§§ 32-35 to 32-49: Reserved for future codification purposes.

ARTICLE 5.

Compensation.

§ 32-50. Compensation.

(a) Express Trust in Writing. — Unless otherwise provided in the instrument creating the trust relationship, a trustee under an express trust in writing, either inter vivos or testamentary, shall receive compensation for serving as a trustee as follows:

(1) Income Compensation. — An annual charge on gross income of:

a. Five percent (5%) on the first five thousand dollars ($5,000) of income;

b. Four percent (4%) on the next seven thousand five hundred dollars ($7,500) of income;

c. Three percent (3%) on the next twelve thousand five hundred dollars ($12,500) of income;

d. Two and one-half percent (2½%) on the next twenty-five thousand dollars ($25,000) of income;

e. Two percent (2%) on all income over fifty thousand dollars ($50,000).

(2) Compensation on Principal Consisting of Personal Property. — An annual charge on the current value of that portion of the principal consisting of personal property, of:

a. Four-tenths ($^4/_{10}$) of one percent (1%) on the first twenty-five thousand dollars ($25,000) of principal;

b. Three-tenths ($^3/_{10}$) of one percent (1%) on the next twenty-five thousand dollars ($25,000) of principal;
c. Two-tenths ($^2/_{10}$) of one percent (1%) on the next fifty thousand dollars ($50,000) of principal;
d. One-tenth ($^1/_{10}$) of one percent (1%) on the next one hundred thousand dollars ($100,000) of principal;
e. One-twentieth ($^1/_{20}$) of one percent (1%) on all principal over two hundred thousand dollars ($200,000).

(3) Maximum Compensation. — In addition to the minimum compensation set out in (1) and (2) above, the clerk of superior court at the written request of the trustee may in his discretion allow additional compensation in those cases where the trustee has rendered services beyond the routine services expected by a trustee but in no event shall the total annual aggregate compensation exceed five percent (5%) upon the gross income and the expenditures made in accordance with law, and five-tenths ($^5/_{10}$) of one percent (1%) upon the current value of principal, both real and personal property, held as assets of the trust. In determining the amount of such additional compensation, if any, the clerk of superior court shall consider the time, responsibility, and skill involved in the management activities of the trustee.

For purposes of determining the annual compensation on principal, the current value of the principal shall be determined as of the date of the first annual accounting and each year thereafter on the anniversary of that date by an appraisal of the trustee and certified to the clerk of superior court.

When computing the current value of real property for purposes of subdivision (3) of this subsection (a) the value of a usual dwelling house occupied by a beneficiary and lands reasonably necessary to the use and enjoyment thereof shall not be included.

This section is not applicable to trustees under bond issues, trustees of corporate trusts, employee benefit trusts, deeds of trusts of real property used for purposes of securing loans, or trusts for similar purposes.

(b) Effect of Provisions in the Instrument. — Nothing in the provisions of this section shall be interpreted to prevent a corporate trustee from applying its regularly adopted schedule of compensation in effect and applicable at the time of performance of such services where the settlor or testator in the instrument creating the trust has so stipulated. In those instances where the compensation provision in the instrument creating the trust relationship provides that the compensation shall not exceed the maximum allowed by law this shall be construed as an expression of intention that the compensation shall not exceed the maximum compensation as provided in G.S. 32-50(a)(3), above.

(c) Other Fiduciary Relationships. — Unless otherwise provided, fiduciaries other than trustees under express trusts shall be entitled to compensation fixed in the discretion of the clerk of superior court not to exceed five percent (5%) upon the amounts of receipts, including the value of all personal and real property when received, and upon the expenditures made in accordance with law. In determining the amount of such compensation, both upon the property received and upon expenditures made, the clerk of superior court shall consider the time, responsibility, trouble and skill involved in the management of such property. The clerk of superior court may allow compensation from time to time during the course of the management but the total amount allowed shall be determined on final settlement and shall not exceed the limit fixed in this subsection.

(d) Opening Charge. — Unless otherwise provided in the instrument, a successor trustee or a trustee of a testamentary trust who did not serve as a personal representative for the estate, may make a written request to the clerk of superior court for an allowance of an opening charge for his services as a trustee. The clerk of superior court may in his discretion allow such opening charge not to exceed one percent (1%) of the value of the principal, both real and personal, received. In determining the amount of such charge, if any, the clerk of superior court shall consider the time, responsibility, and skill involved in the opening of the trust or other fiduciary relationship.

(e) Closing Charge. — Unless otherwise provided in the instrument, a trustee of an express trust or other fiduciary may make a written request to the clerk of superior court for the allowance of a closing charge. If the clerk of superior court makes a written finding of fact that there are unusual circumstances supporting such a request he may in his discretion allow a closing charge not to exceed one percent (1%) of the principal, both real and personal. In determining the amount of such charge, if any, the clerk of superior court shall consider the time, responsibility, and skill involved in the closing of the trust or other fiduciary relationship.

(f) Oral Trust Agreements. — Unless otherwise provided in the oral trust agreement, a trustee under a valid oral trust agreement shall receive compensation in accordance with subsection (a).

(g) Principal Less than Ten Thousand Dollars ($10,000). — Notwithstanding subsections (a), (b) and (c) above, when the gross value of the principal is ten thousand dollars ($10,000) or less, the clerk of superior court is authorized and empowered to fix the compensation to be received by the trustee or fiduciary in an amount as the clerk in his discretion, deems just and adequate.

(h) Compensation Considered Costs of Management. — All compensation, whether allocated to income or principal shall be charged as part of the costs of management and, upon allowance, may be retained out of the assets against creditors and all other persons claiming an interest.

(i) Charges for Management; Appeals. — Nothing in this section shall be construed:

(1) To prevent the clerk of superior court from allowing reasonable sums for necessary charges and disbursements incurred in the management of the principal; or
(2) To abridge the right of any interested party to appeal an order of the clerk.

(j) Default or Misconduct. — No fiduciary or trustee who has been guilty of default or misconduct in the due execution of his office resulting in the revocation of his appointment shall be entitled to any compensation under the provisions of this Article.

(k) Income Tax Withholding. — For the purpose of computing the compensation whenever any portion of the dividends, interest, rents or other amounts payable to a fiduciary or trustee is required by any law of the United States or other governmental unit to be withheld for income tax purposes by the person, corporation, organization or governmental unit paying the same, the amount so withheld shall be deemed to be income. (1977, c. 814, s. 1.)

Editor's Note. — Session Laws 1977, c. 814, s. 10, makes this Article effective Jan. 1, 1978.

§ 32-51. Counsel fees allowable to attorneys serving as fiduciaries.

The clerk of superior court, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as a fiduciary or trustee (in addition to the compensation allowed him as a fiduciary or trustee) where such attorney in behalf of the trust or fiduciary relationship renders professional services, as an attorney, which are beyond the ordinary routine of management and of a type which would reasonably justify the retention of legal counsel by any fiduciary or trustee not himself licensed to practice law. (1977, c. 814, s. 1.)

§ 32-52. Applicability.

The provisions of this Article shall apply to all trusts and fiduciary relationships created on or after January 1, 1978, and to all express trusts in writing existing on January 1, 1978 if the instrument does not contain any provision relating to compensation. (1977, c. 814, s. 1.)

Chapter 33.

Guardian and Ward.

Article 1.

Creation and Termination of Guardianship.

Sec.

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ARTICLE 1.

Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court.

The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, incompetents or inebriates: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, incompetents or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents, or unless an infant resides with an individual who is domiciled in the State of North Carolina and who is guardian of such infant's estate, in which case a guardian of the person of such infant may be appointed by the clerk of the superior court in the county in which the guardian of such infant's estate is domiciled. Provided, further, where any adult person is declared incompetent in connection with his commitment to a mental hospital or is found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said persons. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians. (1762, c. 69, ss. 5, 7; R.C., c. 54, s. 2; 1868-9, c. 201, s. 4; Code, s. 1566; Rev., s. 1766; 1917, c. 41, s. 1; C.S., s. 2150; 1935, c. 467; 1945, c. 902; 1953, c. 615; 1959, c. 1028, s. 5; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "infants, incompetents or inebriates" for "infants, idiots, lunatics, inebriates, and inmates of the Caswell School" and "infants, incompetents, or inebriates" for "infants, idiots, lunatics, or inebriates" in the first sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Legal Periodicals. — For comment analyzing North Carolina guardianship laws, see 54 N.C.L. Rev. 389 (1976).

CASE NOTES

Cited in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 33-2. Appointment by parents.

Parents are presumed to know the best interest of their children, and any parent may by last will and testament recommend a guardian for any of his or her unmarried minor children, whether born at the parent's death or en ventre sa mere, for such time as the children may remain under 18 years of age, or for any less time. Such will may be made without regard to whether the testator is an adult or minor. Any parent who willfully abandons a child or children shall relinquish the right of appointment. Any will containing such provision shall be a strong guide to the clerk of superior court in appointing a guardian in the absence of a surviving parent, and shall control where there is no dispute, and, if both parents make such recommendations, the will with the latest date shall, in absence of other relevant factors, prevail. Every such appointment shall be good and effectual against any person claiming to be the guardian of such child or children. Every guardian by will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians: Provided, however, that in the event it is so specifically directed in said will such guardian so appointed shall be permitted to qualify and serve without giving bond, unless the clerk of the superior court having jurisdiction of said guardianship shall find as a fact and adjudge that the interest of such minor or incompetent would be best served by requiring such guardian to give bond. (1762, c. 69; R. C., c. 54; 1868-9, c. 201; 1881, c. 64; Code, ss. 1562, 1563, 1564; Rev., ss. 1762, 1763, 1764; 1911, c. 120; C. S., s. 2151; Ex. Sess. 1920, c. 21; 1941, c. 26; 1945, c. 73, s. 20; 1947, c. 413, ss. 1, 2; 1971, c. 1231, s. 1; 1977, c. 713; 1979, c. 110, s. 9.)

Effect of Amendments. — The 1977 amendment rewrote this section.

The 1979 amendment, effective July 1, 1979, substituted "a guardian for" for "disposition of the custody and tuition of" in the first sentence, substituted "clerk of superior court in appointing a guardian in the absence of a surviving parent" for "court in awarding custody in the absence of a surviving parent, subject to the provisions of G.S. 50-13.1 through 50-13.8," in the fourth sentence and substituted "to be the guardian" for "the custody and tuition" in the fifth sentence.

Session Laws 1979, c. 110, s. 2, contains a severability clause.

Legal Periodicals. — For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.

Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever at any time it appears most conducive to the proper care of the ward's estate, and to his suitable maintenance, nurture and education. In such cases the clerk must order what yearly sums of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the incompetent or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the ward's condition in life and the kind and value of his estate may require. All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only. (1840, c. 31; R.C., c. 54, s. 3; 1868-9, c. 201, ss. 6, 7; Code, ss. 1567, 1568, 1569; Rev., ss. 1767, 1768, 1769; C.S., s. 2155; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, deleted "during minority, inebriety, idiocy or lunacy" following "at any time" in the first sentence, substituted "ward's" for "orphan's, inebriate's, idiot's, or lunatic's" in that sentence, and substituted "incompetent or inebriate" for "idiot, lunatic or inebriate" in the second sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-7. Proceedings on application for guardianship.

On application to any clerk of the superior court for the guardianship of any infant or incompetent, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant or incompetent are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant or incompetent, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant or incompetent. (C.C.P., s. 474; Code, s. 1620; Rev., s. 1772; 1917, c. 41, s. 2; C.S., s. 2156; 1959, c. 1028, s. 5; 1977, c. 725, s. 4; 1979, c. 110, s. 10.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "infant or incompetent" for "infant, idiot, inebriate, lunatic, or inmate of the Caswell School" throughout the section.

The 1979 amendment, effective July 1, 1979, deleted "custody and" preceding "guardianship" near the beginning of the first sentence. The amendatory act directed that the words be deleted in line 3 of the section, whereas the words actually appeared in line 2. The amendment has nevertheless been given effect in the section as set out above.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Session Laws 1979, c. 110, s. 2, contains a severability clause.

ARTICLE 2.

Guardian's Bond.

§ 33-12. Bond to be given before receiving property.

No guardian appointed for an infant or incompetent shall be permitted to receive property of the infant or incompetent until he shall have given sufficient security, approved by a judge, or the court, to account for and apply the same under the direction of the court; provided, however, that when a guardian is appointed for an infant or incompetent for the purpose of bringing an action on behalf of that infant or incompetent and when there are no other assets in the ward's estate or other assets belonging to the minor in the State of North Carolina, such guardian shall not be required to give sufficient security until such time as the property is turned over to such guardian, at which time the guardian shall give sufficient security approved by a judge or the court to account for and apply the same under the directions of the court. (C.C.P., s. 355; Code, s. 1573; Rev., s. 1777; C. S., s. 2161; 1967, c. 40, s. 1; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "infant or incompetent" for "infant, idiot, lunatic, insane person or inebriate" in four places.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-13. Terms and conditions of bond; increased on sale of realty.

Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the State, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. Where such bond is executed by personal sureties the penalty in such bond must be double, at least, the value of all personal property and the rents and profits issuing from the real estate of the ward, which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or any other person, but where such bond shall be executed by a duly authorized surety company, the penalty in such bond may be fixed at not less than one and one-fourth times the value of all personal property and the rents and profits issuing from the real estate of the ward: Provided, however, the clerk of the superior court may accept bond in estates, where the value of all personal property and rents and profits from real estate exceeds the sum of one hundred thousand dollars ($100,000), in a sum equal to the value of all the personal property and rents and profits from real estate, plus ten percent (10%) of the value of all the personal property and rents and profits from real estate belonging to the estate. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge touching the guardianship of the estate committed to him. If, on application by the guardian, the court or judge shall decree a sale for any of the causes prescribed by law of the property of such infant or incompetent, before such sale to be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold, except where such bond is executed by a duly authorized surety company, in which case the penalty of said bond need not exceed one and one-fourth times the amount of said real property so sold. (1762, c. 69, s. 7; 1825, c. 1285, s. 2; 1833, c. 17; R. C., c. 54, s. 5; 1868-9, c. 201, s. 11; 1874-5, c. 214; Code, s. 1574; Rev., ss. 323, 1778; C. S., s. 2162; 1925, c. 131; 1935, c. 385; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "infant or incompetent" for "infant, idiot, lunatic or insane person" in the last sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-13.2. Deposited money; exclusion in computing amount of bond.

Notwithstanding the provisions of G.S. 33-13, in any proceeding for the determination of the amount of bond to be required of a guardian, whether at the time of the appointment or subsequently, when it appears that the estate of the ward includes money which has been or will be deposited in a bank or banks in this State, or money which has been or will be invested in an account or accounts in an insured savings and loan association or associations upon condition that such money or securities will not be withdrawn except on authorization of the court, the court may, in its discretion, order such money so deposited or so invested and shall exclude such deposited money from the computation of the amount of such bond or reduce the amount of bond to be required in respect of such money to such an amount as it may deem reasonable.

The petitioner for letters of guardianship may deliver to any such bank any such money in his possession or may deliver to any such association any such money in his possession or may allow such bank to retain any such money already in its possession or may allow such association to retain any such money already invested with it; and, in either event, the petitioner shall secure and file with the court a written receipt including the agreement of the bank or association that such money shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money, the bank or association shall be protected to the same extent as though it had received the same from a person to whom letters of guardianship had been issued.

The term "account in an insured savings and loan association" as used in this section means any account in a savings and loan association which is insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation or by a mutual deposit guaranty association authorized by Article 7A of Chapter 54 of the General Statutes of North Carolina.

The term "money" as used in this section means the principal of the ward's estate and does not include the income earned by the principal of the ward's estate which may be withdrawn without any authorization of the court. (1977, c. 992, s. 1.)

Editor's Note. — Session Laws 1977, c. 992, s. 2, makes this section effective July 1, 1977.

§ 33-15. Where several wards with estate in common, one bond sufficient.

When the same person is appointed guardian to two or more minors or incompetents possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action. (1822, c. 1161; R. C., c. 54, s. 8; 1868-9, c. 201, s. 13; Code, s. 1576; Rev., s. 1780; C. S., s. 2164; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "minors or incompetents" for "minors, idiots, lunatics or insane persons."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-18. Liability of clerk for taking insufficient bond.

If any clerk of the superior court shall commit the estate of an infant, incompetent or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable. (1762, c. 69, ss. 5, 6; R. C., c. 54, s. 2; 1868-9, c. 201, s. 51; Code, s. 1614; Rev., s. 1784; C. S., s. 2167; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "infant, incompetent or inebriate" for "infant, idiot, lunatic, insane person or inebriate."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Article 3.

Powers and Duties of Guardian.

§ 33-20. Guardian to take charge of estate.

CASE NOTES

Including Damages for Wrongs, etc. — In accord with original. See State ex rel. Duckett v. Pettee, 50 N.C. App. 119, 273 S.E.2d 317 (1980).

An action for divorce based upon one year's separation cannot be maintained by a general guardian on behalf of an incompetent. Freeman v. Freeman, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

Nowhere in this Chapter or Chapter 35 (Mentally ill persons and incompetents) is there express statutory authority for the general guardian of an incompetent to bring an action for divorce. Freeman v. Freeman, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

An action for divorce based upon one year's separation is not a necessary action within this section. Freeman v. Freeman, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

§ 33-25. Guardians and other fiduciaries authorized to buy real estate foreclosed under mortgages executed to them.

On application of the guardian or other fiduciary by petition, verified upon oath, to the superior court, showing that the purchase of real estate is necessary to avoid a loss to the said ward's estate by reason of the inadequacy of the amount bid at foreclosure sale under a mortgage or deed of trust securing the repayment of funds previously loaned the mortgagor by said guardian or other fiduciary, and that the interest of the ward would be materially promoted by said purchase, the proceedings shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, or by affidavit of three disinterested freeholders over 18 years of age who reside in the county in which said land lies, a decree may thereupon be made that said real estate be purchased by such person; but no purchase of real estate shall be made until approved by a judge of the superior court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by a judge, and then only in compliance with the terms and conditions set out in said order and judgment. (1935, c. 156; 1971, c. 1231, s. 1; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, deleted "of any idiot, inebriate, lunatic, non compos mentis or any person incompetent from want of understanding to manage his own affairs for any cause or reason, or any minor or infant, or any other person for whom such guardian or fiduciary has been appointed" following "guardian or other fiduciary" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-27. Personal representative of guardian to pay over to clerk.

In all cases where a guardian dies, it is competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to the ward and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid. (1881, c. 301, s. 2; Code, s. 1622; Rev., s. 1794; C. S., s. 2176; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, deleted "of any minor child or of an idiot, lunatic, inebriate or insane person" following "where a guardian" near the beginning of the section and substituted "the ward" for "any such minor child, idiot, lunatic, insane person or inebriate" near the middle of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 4.

Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.

CASE NOTES

Proof Required. — The "satisfactory proof" required under this section must be some proof in addition to the guardian's petition and must show the necessity for the proposed sale. In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976). — Ed. note.

ARTICLE 5.

Returns and Accounting.

§ 33-39. Annual accounts.

Every guardian shall, within 30 days after the expiration of one year from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. The guardian shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness. (1762, c. 69, ss. 9, 15; R. C., c. 54, ss. 11, 12; 1871-2, c. 46; Code, s. 1617; Rev., s. 1805; C. S., s. 2186; 1965, c. 802; 1981, c. 955, s. 3.)

Effect of Amendments. — The 1981 amendment rewrote the second sentence, which formerly read "He must produce vouchers for all payments."

§ 33-43. Commissions.

The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors under the provisions of G.S. 28A-23-3. (1762, c. 69, ss. 18, 19; R. C., c. 54, s. 28; 1868-9, c. 201, s. 50; Code, s. 1613; Rev., s. 1809; C. S., s. 2190; 1977, c. 814, s. 7.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, added "under the provisions of G.S. 28A-23-3" to the end of the section.

ARTICLE 6.

Public Guardians.

§ 33-47. When letters issue to public guardian.

The public guardian shall apply for and obtain letters of guardianship in the following cases:

(1) When a period of six months has elapsed from the discovery of any property belonging to any minor, incompetent or inebriate, without guardian.

(2) When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian; but it is lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (1874-5, c. 221, ss. 6, 7; Code, s. 1561; Rev., s. 1760; C.S., s. 2194; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "idiot, lunatic, insane person" in subdivision (1).

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-47.1. Article applicable only to minors.

This Article shall not apply to adults found incompetent under Article 1A, Chapter 35 of the General Statutes. (1977, c. 725, s. 4.)

Editor's Note. — Session Laws 1977, c. 725, s. 8, provides: "This act shall become effective on March 1, 1978, and shall apply only to appointments made on or after that date."

ARTICLE 7.

Foreign Guardians.

§ 33-48. Right to removal of infant's or ward's personalty from State.

Where any ward residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this State, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate whether the same be in the hands of any guardian residing in this State, or of any executor, administrator or other person holding for the ward or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian or trustee of the ward duly appointed at the place where such ward resides, or in the event no guardian or trustee has been appointed the court or officer of the court authorized by the laws of the state or territory or for the District of Columbia or Canada or other foreign country to receive moneys belonging to any ward when no guardian or trustee has been appointed for such person, may apply to have such estate removed to the residence of the ward by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated which shall be proceeded with as in other cases of special proceedings. (1820, c. 1044; 1842, c. 38; R. C., c. 54, s. 29; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168; Code, ss. 1598, 1601; Rev., s. 1816; 1913, c. 86, s. 1; C. S., s. 2195; 1937, c. 307; 1963, c. 999, s. 1; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "ward" for "infant, ward, idiot, lunatic or insane person" near the beginning of the section and in three places near the middle of the section, and substituted "ward" for "infants, idiots, lunatics or insane persons" near the middle of the section, and for "infant, idiot, lunatic or insane person" near the end of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 33-49.1. Transfer of guardianship.

When any ward or cestui que trust, for whom a guardian or trustee has been appointed, lives in a county in this State other than the county in which letters were issued to such guardian or in which such trustee was appointed, the trustee or guardian may, by petition filed with the clerk of court of the county in which letters were issued or in which he was appointed, transfer the guardianship or trusteeship to the county of the residence of the ward or cestui que trust. Upon the removal of such guardianship or trusteeship, the clerk of the court of the county to which it is removed shall have the same powers and authority as he would have had if he had originally issued the letters of guardianship or appointed the trustee, and all reports and accounts required by law to be filed by the guardian or trustee shall be filed with the clerk of the court of the county to which such guardianship or trusteeship is removed. (1945, c. 194; 1961, c. 973; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, deleted "mental defective, mentally disordered person" following "ward" in two places in the first sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 8.

Estates without Guardian.

§ 33-54. When receiver to pay over estate.

When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the infant, on coming of age, or in case of his death, his executor, administrator, or collector, and the heir or personal representative of the incompetent person, shall have the like remedy against the receiver. (1844, c. 41, s. 4; R. C., c. 54, s. 17; 1868-9, c. 201, s. 24; Code, s. 1587; Rev., s. 1814; C. S., s. 2201; 1977, c. 725, s. 4.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "incompetent person" for "idiot, lunatic or insane person" near the end of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 11.

Guardians of Children of Servicemen.

§ 33-67. Clerk of superior court to act as temporary guardian to receive and disburse allotments and allowances.

In all cases where a citizen of this State is serving in the armed forces of the United States and has made an allotment or allowance to his child, children or other minor dependents as provided by the wartime allowances to Service Men's Dependents Act or any other act of Congress, and the other parent of said child, children or other minor dependents or other person of lawful age designated in said allowance or allotment to receive such moneys and disburse them for the benefit of said minor dependents shall die or become mentally incompetent, and such person so serving in the armed forces of the United States shall be reported as missing in action or as a prisoner of war and shall be unable to designate another person to receive and disburse said allotment or allowance to said minor dependents; then and in such event the clerk of the superior court of the county of the legal residence of said serviceman or person serving in the armed forces of the United States, is hereby authorized and empowered to act as temporary guardian of such minor dependents for the purpose of receiving and disbursing such allotments and allowance funds for the benefit of such minor dependents. (1945, c. 735; 1977, c. 714.)

Effect of Amendments. — The 1977 amendment substituted "other parent" for "mother" near the middle of the section.

ARTICLE 12.

Gifts of Securities and Money to Minors.

§ 33-68. Definitions.

In this Article, unless the context otherwise requires:

(11) A "member" of a "minor's family" means any of the minor's parents, grandparents, great-grandparents, brothers, sisters, uncles and aunts, whether of the whole blood or the half blood, or by or through legal adoption or the adult spouse of a brother, sister, aunt or uncle. (1977, c. 463, s. 1.)

Effect of Amendments. — The 1977 amendment added "or the adult spouse of a brother, sister, aunt or uncle" at the end of subdivision (11).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (11) are set out.

Legal Periodicals. — For survey on 1972 case law on inheritance tax and the Uniform Gifts to Minors Act, see 51 N.C.L. Rev. 1184 (1973).

§ 33-69. Manner of making gift.

(a) An adult person may, during his lifetime, make a gift of a security, money, or life insurance, to a person who is a minor on the date of the gift.

(1) If the subject of the gift is a security in registered form, by registering it in the name of the donor, another adult person, an adult member of

the minor's family, a guardian of the minor, or a trust company, followed, in substance, by the words: "as custodian for . . . .
. . . . under the North Carolina Uniform Gifts to Minors
(name of minor)
Act";

(2) If the subject of the gift is a security not in registered form, by delivering it to an adult person other than the donor, an adult member, other than the donor, of the minor's family, a guardian of the minor, or a trust company, accompanied by a statement of gift in the following form, in substance, signed by the donor and the person designated as custodian:

"GIFT UNDER THE NORTH CAROLINA UNIFORM GIFTS TO MINORS ACT

I, ..., hereby deliver to . . . .
(name of donor) (name of custodian)
as custodian for . . . . under the North Carolina
(name of minor)
Uniform Gifts to Minors Act, the following security(ies): (insert an appropriate description of the security or securities delivered sufficient to identify it or them).

. . . .
(signature of donor)

. . . . hereby acknowledges receipt of the above
(name of custodian)
described security(ies) as custodian for the above minor under the North Carolina Uniform Gifts to Minors Act.

Dated: . . . .
(signature of custodian)"

(3) If the subject of the gift is money, by paying or delivering it to a broker or a bank for credit to an account in the name of the donor, another adult person, an adult member of the minor's family, a guardian of the minor or a bank with trust powers, followed, in substance, by the words: "as custodian for . . . .
(name of minor)
under the North Carolina Uniform Gifts to Minors Act."

(4) If the subject of the gift is life insurance, the ownership of the policy of life insurance shall be registered by the donor of such policy in his own name or in the name of an adult member of the minor's family, in the name of any guardian of the minor, or a trust company, followed by the words: "as custodian for . . . . under
(name of minor)
the North Carolina Uniform Gifts to Minors Act," and such policy of life insurance shall be delivered to the person in whose name it is thus registered as custodian. If the policy is registered in the name of the donor, as custodian, such registration shall of itself constitute the delivery required by this section.

(d) A donor who makes a gift to a minor as provided in subsection (a)(3) may designate a successor custodian who shall become custodian if the original custodian is not eligible, renounces or dies before the minor attains the age of 18 years. The successor custodian shall be a person eligible to be a custodian as provided in subsection (a)(3). The successor custodian may be designated in the name of the account described in subsection (a)(3) by substantially the following words which may appear after the words required in subsection (a)(3):

"(name of custodian) is designated as successor custodian". (1955, c. 1061; 1959, c. 1166, s. 1; 1979, c. 698; c. 883, s. 2.)

Effect of Amendments. — The first 1979 amendment, in the first sentence of subdivision (a)(4), deleted the word "or," which previously followed "minor's family," and inserted the words "or a trust company" preceding "followed by."

The second 1979 amendment added subsection (d).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments only subsections (a) and (d) are set out.

§ 33-73. Exemption of third persons from liability.

CASE NOTES

Cited in O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

§ 33-74. Resignation, death or removal of custodian; bond; appointment of successor custodian.

(b) A custodian, whether or not a donor, may resign and designate his successor by:

(1) Executing an instrument of resignation designating the successor custodian; and

(2) Causing each security which is custodial property and in registered form to be registered in the name of the successor custodian followed, in substance, by the words: "as custodian for . . . .
(name of minor)
under the North Carolina Uniform Gifts to Minors Act"; and

(3) Delivering to the successor custodian the instrument of resignation, each security registered in the name of the successor custodian and all other custodial property, together with any additional instruments required for the transfer thereof.

(g) A custodian who is the donor may resign in the manner provided in G.S. 33-74(c) and, notwithstanding the provisions of G.S. 33-74(a), may designate as a successor custodian any person of his selection. (1955, c. 1061; 1959, c. 1166, s. 1; 1971, c. 1231, s. 1; 1977, c. 463, s. 2; 1979, c. 883, s. 1.)

Effect of Amendments. — The 1977 amendment added subsection (g).

The 1979 amendment substituted "whether or not a" for "other than the" in subsection (b).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendments, only subsections (b) and (g) are set out.

§ 33-77. Short title.

Legal Periodicals. — For survey on 1972 case law on inheritance tax and the Uniform Gifts to Minors Act, see 51 N.C.L. Rev. 1184 (1973).

Chapter 34.

Veterans' Guardianship Act.

Sec.

34-13. Investment of funds.

§ 34-13. Investment of funds.

Every guardian shall invest the funds of the estate in any of the following securities:

(1) United States government bonds.

(2) State of North Carolina bonds issued since the year 1872.

(3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under the seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court. Any guardian may encumber the home or farm so purchased for the entire purchase price or balance thereof to enable the ward to obtain benefits provided in Title 38, U.S. Code, Chapter 37, upon petition to and order of the clerk of superior court of the county of appointment of said guardian and approved by the resident or presiding judge of the superior court. Notice of hearing on such petition, together with copy of the petition, shall be given to the United States Veterans Administration and the Department of Military and Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing.

(4) Any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.

(5) Repealed by Session Laws 1979, c. 467, s. 22.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1929, c. 33, s. 13; 1933, c. 262, s. 2; 1957, c. 199; 1959, c. 1015, s. 1; 1967, c. 564, ss. 3, 4; 1973, c. 620, s. 9; 1979, c. 467, s. 22.)

Effect of Amendments. — The 1979 amendment rewrote subdivision (4) and deleted former subdivision (5), which provided for either the depositing of funds in savings accounts in federally insured banks in North Carolina or the purchasing of certificates of deposit issued by federally insured banks in North Carolina.

Chapter 35.

Persons with Mental Diseases and Incompetents.

Article 1.

Definitions.

Sec.
35-1.1. Definitions of mental disease, etc.
35-1.2 to 35-1.5. [Reserved.]

Article 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

35-1.6. Legislative purpose.

Part 2. Definitions.

35-1.7. Definitions.

Part 3. Jurisdiction and Venue.

35-1.8. Jurisdiction and venue; exclusive procedure.
35-1.9. Change of venue.

Part 4. Proceedings before Clerk.

35-1.10. Petition before clerk.
35-1.11. Costs in action.
35-1.12. Contents of petition.
35-1.13. Service of petition.
35-1.14. Subsequent service.
35-1.15. Appointment of interim guardian.
35-1.16. Rights to counsel, evaluation, and jury; hearing on petition.
35-1.17. Hearing before clerk on appointment of guardian.
35-1.18. Clerk to issue letters of appointment.
35-1.19. Bond.
35-1.20. Appeals from clerk's orders.
35-1.21 to 35-1.27. [Reserved.]

Part 5. Qualifications, Priorities, Duties, and Liabilities of Guardians.

35-1.28. Qualifications of guardians.
35-1.29. Priorities for appointment.
35-1.30. Rule-making power of Secretary of Human Resources.
35-1.31. Status reports.
35-1.32. Duties of designated agency.
35-1.33. Procedure to compel status reports.
35-1.34. General powers and duties of guardians with respect to the person.
35-1.35. Powers and duties of guardians with respect to the estate.
35-1.36. Guardian's financial reports' costs.
35-1.37. Clerk's continuing jurisdiction over guardians.
35-1.38. Clerk's continuing jurisdiction over proceedings.
35-1.39. Proceedings to restore ward to competency.
Sec.
35-1.40. [Reserved.]

Part 6. Testamentary Appointment of Guardians.

35-1.41. Testamentary appointment.

Article 2.

Guardianship and Management of Estates of Incompetents.

35-2. Appointment of guardian.
35-2.1. Guardian appointed when issues answered by jury in any case.
35-3. [Repealed.]
35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State.
35-4. Restoration to sanity or sobriety; effect; how determined; appeal.
35-6. Estates without guardian managed by clerk.
35-7. [Repealed.]
35-8. Renewal of obligations by guardians.
35-9. Guardian not liable.

Article 3.

Sales of Estates.

35-10. Clerk may order sale, renting or mortgage.
35-10.1. Abandoned incompetent spouse.
35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.
35-13. Spouse of incompetent husband or wife entitled to special proceeding for sale of property.

Article 5.

Surplus Income and Advancements.

35-19. Income of incompetent surviving spouse used for children's support.
35-20. Advancement of surplus income to certain relatives.
35-21. Advancement to adult child or grandchild.
35-23. Distributees to be parties to proceeding for advancements.
35-24. Advancements to be equal; accounted for on death.

Article 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

35-36. Sterilization of mentally retarded in State institutions.

Sec.
35-37. Sterilization of mentally retarded not in State institutions.
35-39. Duty of petitioner.

ARTICLE 1.

Definitions.

§ 35-1. Inebriates defined.

Legal Periodicals. — For comment analyzing North Carolina guardianship laws, see 54 N.C.L. Rev. 389 (1976).

§ 35-1.1. Definitions of mental disease, etc.

The words "mental disease," "mental disorder" and "mental illness" shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The terms shall be construed to include "lunacy," "unsoundness of mind," and "insanity."

A "mentally retarded" person refers to a person who has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during his developmental period. (1945, c. 952, s. 2; 1979, c. 751, s. 29.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote the second paragraph, which formerly defined "a mental defective."

CASE NOTES

The definition of mental illness contained in this section is virtually the same definition contained in § 122-36(d). In re Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976).

Applied in North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Cited in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§§ 35-1.2 to 35-1.5: Reserved for future codification purposes.

ARTICLE 1A.

Guardianship of Incompetent Adults.

Part 1. Legislative Purpose.

§ 35-1.6. Legislative purpose.

The General Assembly of North Carolina recognizes that:

(1) Some incompetent adults, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.

(2) Those individuals not able to act effectively on their own behalf have a right to a responsible, impartial guardian.
(3) The essential purpose of guardianship is to replace an individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.
(4) Limiting the rights of the individual by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.
(5) Guardianship should seek to preserve for the incompetent individual the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent individual should be permitted to participate as fully as possible in all decisions that will affect him. (1977, c. 725, s. 1.)

Cross References. — For provisions relating to guardians and wards, see § 33-1 et seq. As to social services officials and employees as public guardians, see § 108-19.1. As to the provision of protective services to disabled adults who lack the capacity to consent to such services, see § 108-106.2. As to mental health officials and employees as public guardians, see § 122-24.1.

Editor's Note. — Session Laws 1977, c. 725, s. 8, provides: "This act shall become effective on March 1, 1978, and shall apply only to appointments made on or after that date."

Legal Periodicals. — For a survey of 1977 law on health care regulation, see 56 N.C.L. Rev. 857 (1978).

Part 2. Definitions.

§ 35-1.7. Definitions.

When used in this Article:
(1) The term "accounting" refers to the financial or status reports filed with the clerk, designated agency, respondent, or other person or party with whom such reports are required to be filed.
(2) The term "clerk" means the clerk of the superior court of the county in which proceedings under this Article are brought or filed.
(3) The term "designated agency" means the State or local human resources agency designated by the clerk in his order to prepare, cause to be prepared, or assemble the multidisciplinary evaluation and to receive, comment upon, and certify receipt of a financial or status report or to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, diagnostic evaluation centers, social service, and developmental disabilities agencies.
(4) The term "disinterested public agent" means an adult officer, agent, or employee of a State human resources agency who has no immediate responsibilities for providing services to a ward or the director or assistant directors of a local human resources agency. The fact that a disinterested public agent is employed by a State or local human resources agency that provides financial assistance to a ward does not disqualify that person from being appointed a guardian.
(5) The term "department" means the Department of Human Resources, unless the context requires otherwise.
(6) The term "financial report" means the report filed by the guardian concerning all financial transactions, including receipts and expenditures of money of the ward, sale of the ward's property, or other transactions involving the ward's property.

(7) The term "general guardian" means a guardian of both the estate and the person.

(8) The term "guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rules of Civil Procedure, Rule 17(b) and (c).

(9) The term "guardian of the estate" means a guardian appointed solely for the purpose of managing the property, estate, or business affairs of a ward.

(10) The term "guardian of the person" means a legal guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.

(11) The term "incompetent adult" means an adult who lacks sufficient capacity to make or communicate important decisions concerning his person, family, or property because of mental illness, mental retardation, epilepsy, cerebral palsy, or autism.

The term "incompetent child" means a minor who, other than by reason of his minority, is impaired to the extent that he lacks sufficient capacity to make or communicate important decisions concerning his person, family, or property because of mental illness, mental retardation, epilepsy, cerebral palsy, or autism.

(12) The term "important decisions concerning his person, family, or property" means decisions by a ward concerning the furnishing of the necessities of life, including without limitation food, shelter, clothing, and medical care, for himself and his family, if any.

(13) The term "indigent" refers to a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action brought under this Article.

(14) The term "interested person" means any individual who has an interest or stake in the personal well-being or in the estate, property, or business affairs of a ward.

(15) The term "interim guardian" means a guardian appointed under the provisions of G.S. 35-1.15.

(16) The terms "legal guardian" or "guardian" mean the guardian appointed by the clerk.

(17) The term "mental health professional" has the same meaning as set out in G.S. 122-36(h).

(18) The term "mental retardation professional" has the same meaning as set out in G.S. 122-36(i).

(19) The term "multidisciplinary evaluation" means an evaluation of the respondent that is required to contain current medical, psychological, and social work evaluations and that may contain current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications-disorders. The evaluations are current if made not more than one year from the date on which a petition for guardianship is filed. The evaluation shall set forth the nature and extent of the ward's disability, and recommend a guardianship plan and program.

(20) The term "person in loco parentis" means a person, other than a parent or legal, interim, or successor guardian, who has assumed the responsibility for the care, custody, and control of the ward. It includes, without limitation, foster parents, other persons having temporary or permanent care, custody, and control, and State or local government departments of social services or the Department or any of its divisions having such care, custody, and control.

(21) The term "physician" means a medical doctor who is duly licensed by this State to practice medicine.

(22) The term "psychologist" means a person who is duly licensed by this State as a psychologist or is employed as a psychologist by the Department of Human Resources or any State or local agency under the Department's supervision, operation or control.

(23) The term "treatment facility" means the same as the term "treatment facility" means under the provisions of G.S. 122-36(g) and G.S. 122-56.2(b), and it includes group homes, halfway houses and other community-based residential facilities for impaired adults.

(24) The term "status report" means the report required by G.S. 35-1.31 to be filed by the guardian of the ward. A status report shall include a report of a recent medical and dental examination of the ward by one or more physicians or dentists, a report on the legal guardian's performance of his duties as set forth by this Article and in the order of the clerk authorizing the appointment of a legal guardian, and a report on the ward's condition, needs, and development. It also may contain, without limitation, reports of mental health or mental retardation professionals, psychologists, social workers, persons in loco parentis, a member of a multidisciplinary evaluation team, a designated agency, a disinterested public agent or agency, a guardian ad litem, a guardian of the estate, an interim guardian, a successor guardian, an officer, official, employee or agent of the Department, or any other interested person, including reports from group home parents or supervisors if the ward lives in a group home, a report from an employer if the ward is employed in competitive employment, a sheltered workshop, a work activities center or in any other working capacity, and a report of a member of the staff of a treatment facility if the ward is a resident patient of one or an outpatient client of one.

(25) The term "testamentary guardian" means a guardian appointed by the last will and testament of a parent of a ward.

(26) The term "ward" means the adult person for whom a guardian has been appointed or is sought to be appointed.

(27) The term "autism" refers to a person who has a physical disorder of the brain that includes disturbance in the developmental rate of physical, social, and language skills, abnormal responses to sensations, absence or delay in speech or language, or abnormal ways of relating to people, objects, and events, and that occurs sometimes by itself and sometimes in connection with other brain-functioning disorders. Autism is (a) a syndrome consisting of withdrawal, very inadequate social relationships, exceptional object relationships, language disturbances, and monotonously repetitive motor behavior; many children with autism will also be seriously impaired in general intellectual functioning; and (b) mental illness observed in young children characterized by severe withdrawal and inappropriate response to external stimulation.

(28) The term "cerebral palsy" refers to a person who has a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of, or damage to, the brain. Cerebral palsy is a disorder dating from birth or early infancy, nonprogressive, characterized by examples of aberrations of motor function (paralysis, weakness, or incoordination) and often other manifestations of organic brain damage such as sensory disorders, seizures, mental retardation, learning difficulty, and behavioral disorders.

(29) The term "epilepsy" refers to a person who is subject to convulsive attacks and during these attacks usually loses consciousness or is subject to convulsive seizures. Epilepsy is a clinical disorder characterized by single or recurring attacks of loss of consciousness,

convulsive movements, or disturbances of feeling or behavior. These transient episodes are associated with excessive neuronal discharges occurring diffusely or focally in the brain. The sites of neuronal discharge determine the clinical manifestations of the seizure.

(30) The term "mental illness" refers to a person who has an illness that so lessens the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control.

(31) The term "mental retardation" refers to a person who has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. (1977, c. 725, s. 1; 1979, c. 751, s. 1.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, added subdivisions (27), (28), (29), (30) and (31).

Part 3. Jurisdiction and Venue.

§ 35-1.8. Jurisdiction and venue; exclusive procedure.

(a) The clerks of superior court have original jurisdiction of proceedings brought or filed under this Article. Venue for such proceedings is in the county where the respondent resides, where he has real property, where either or both of his parents or next of kin reside, or where he is present, or if the respondent is an inpatient or resident of a treatment facility, venue is also in the county in which he resided when admitted to the facility.

(b) This Article establishes the exclusive procedure for adjudicating the following adults to be incompetent, appointing guardians for them, and adjudicating the restoration of their competency: mentally retarded, epileptic, cerebral palsied or autistic persons. This Article also establishes an alternative procedure, in addition to those established by General Statutes Chapter 35, Article 2, for adjudicating mentally ill persons to be incompetent and for appointing guardians for them. If a petition for adjudication of incompetency has been filed against the respondent, alleging him to be mentally ill, under the provisions of Chapter 35, Article 2 and the petition has been dismissed after a hearing on the merits, the clerk on his own motion may dismiss a petition filed under this Article against the same person, alleging him to be mentally ill, unless the petition alleges substantially new facts, not previously alleged in the Article 2 proceeding, tending to prove he is an incompetent adult, as defined in this Article, because of mental illness.

This Article does not apply to persons who are senile or have senile dementia unless they also are mentally ill, mentally retarded, epileptic, cerebral palsied, or autistic adults. (1977, c. 725, s. 1; 1979, c. 751, ss. 2, 3.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote the second sentence of subsection (a), which formerly read: "Venue for such proceedings is in the county where the proposed ward resides, has property, or is present or if the proposed ward is an inpatient or resident of a treatment facility, venue shall include the county in which the resident resided when admitted to the facility." In subsection (b) the amendment added the last sentence in the first paragraph and added the second paragraph.

§ 35-1.9. Change of venue.

Upon a petition of any of the parties or any interested person and upon a finding by the clerk before whom a proceeding under this Article was originally filed that, from all the facts and circumstances of the case, no hardship or prejudice will result to the respondent from a change of venue and that a change of venue will be convenient for all parties, or that the clerk is not disinterested in the proceedings, the clerk may order a change of venue. (1977, c. 725, s. 1; 1979, c. 751, s. 31.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "respondent" for "proposed ward" near the middle of the section.

Part 4. Proceedings before Clerk.

§ 35-1.10. Petition before clerk.

Any person may file a verified petition for the adjudication of incompetence of any adult person by filing the same with the clerk. (1977, c. 725, s. 1; 1979, c. 751, s. 4.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "the adjudication of incompetence of" for "the appointment of a guardian for" in the first sentence.

§ 35-1.11. Costs in action.

Costs shall be assessed as in special proceedings and shall be taxed against the respondent unless in the clerk's opinion the petitioner did not have reasonable grounds to bring the proceedings, in which case they shall be taxed to the petitioner. If the respondent is indigent, the costs shall be borne by the Administrative Office of the Courts. (1977, c. 725, s. 1; 1979, c. 751, s. 5.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section, which formerly read: "Costs shall be assessed, as in special proceedings, to the respondent in any action brought under this Article unless the respondent is indigent, in which case costs shall be borne by the Administrative Office of the Courts."

§ 35-1.12. Contents of petition.

The petition shall set forth, to the extent known:

(1) The name, age, address, and county of residence of the respondent;

(2) The name, address, and county of residence of the petitioner, and his interest in the action;

(3) A general statement of the respondent's property, or that the respondent is indigent, with an estimate of the value of any property, including any compensation, insurance, pension, or allowance to which he is entitled;

(4) A statement of the reason or reasons why the adjudication of incompetence is sought;

(5) The name, address, and county of residence of the respondent's spouse, or, if none, adult children or next of kin, or, if none, person or persons acting in loco parentis;

(6) Repealed by Session Laws 1979, c. 751, s. 6, effective January 1, 1980. (1977, c. 725, s. 1; 1979, c. 751, ss. 6, 31.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "respondent" for "proposed ward" in subdivision (1) and for "ward" in subdivision (3), substituted "respondent's" for "proposed ward's" in subdivisions (3) and (5), substituted "the adjudication of incompetence" for "the appointment of a guardian" in subdivision (4), and deleted subdivision (6), which read: "The name, address, and county of residence of all persons who may have any financial interest in the proceedings."

§ 35-1.13. Service of petition.

A copy of the petition and the written notice of the time, date, and place set for a hearing on the petition shall be served on the respondent and on his guardian ad litem or counsel appointed by the clerk, if any. The petitioner shall mail, by first-class mail, a copy of the petition and the written notice to the person or persons designated in G.S. 35-1.12(5). The clerk, on his own motion, may order notice to be served on any other person pursuant to Rule 4 or the clerk may mail, by first-class mail, a copy of the petition and the written notice to any other person. The sheriff shall serve notice on the designated persons without demanding his fees in advance. Service shall be made as provided by G.S. 1A-1, Rules of Civil Procedure, Rule 4. (1977, c. 725, s. 1; 1979, c. 751, s. 7.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section, which formerly read: "A copy of the petition and the written notice of the time, date, and place set for a hearing on the petition shall be served by the sheriff on the proposed ward and on the person or persons designated in G.S. 35-1.12(5). Service shall be made as provided by G.S. 1A-1, Rules of Civil Procedure, Rule 4. A copy of the petition and the written notice of the time, date, and place set for a hearing on the petition shall be mailed by the court to all persons designated in G.S. 35-1.12(6). The clerk, on his own motion, may order notice to be served on any other person by mail."

§ 35-1.14. Subsequent service.

Unless otherwise provided, all subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rules of Civil Procedure, Rule 5. (1977, c. 725, s. 1; 1979, c. 751, s. 8.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, inserted "to the parties."

§ 35-1.15. Appointment of interim guardian.

(a) The petitioner or the person or persons designated in G.S. 35-1.12(5) may also file a verified petition with the clerk for the appointment of an interim guardian.

(b) The petition shall set forth facts tending to show that there is reasonable cause to believe that the respondent is an incompetent adult and that he is in a condition that, unless appropriate intervention is provided by way of the appointment of a guardian to consent on the respondent's behalf to intervention, constitutes or reasonably appears to constitute an imminent or foreseeable danger to his physical well-being.

(c) Immediately upon receiving the petition for the appointment of an interim guardian, the clerk shall appoint counsel or guardian ad litem to represent the respondent if the petition alleges the ward is indigent. If the petition does not allege that the respondent is indigent, the clerk nevertheless may appoint counsel or a guardian ad litem to represent him, in which case the fees of the court-appointed counsel or guardian ad litem shall be a proper charge against the respondent. The clerk shall also immediately set a time, date, and place for a hearing on the petition. The petition and the order appointing counsel or guardian ad litem and setting the time, date, and place for the hearing shall be promptly served on the respondent and on his counsel or guardian ad litem, if any. The hearing shall be set for a date no later than 15 days after the petition has been served on the respondent. The hearing may be held earlier and in all cases shall be held as early as possible after the petition is filed.

(d) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is an incompetent adult and that he is in a condition that, unless appropriate intervention is provided by way of the appointment of an interim guardian to consent on the respondent's behalf to intervention, constitutes or reasonably appears to constitute an imminent or foreseeable danger to his physical well-being, he shall immediately appoint an interim guardian, make specific findings of fact to support his conclusions, and set forth the guardian's powers and duties. The powers and duties of the interim guardian shall extend only so far as necessary to meet the emergency and in any event not more than 45 days, but the clerk may for good cause shown extend the period of interim guardianship for another 45 days. The interim guardian shall be a guardian of the person and not of the estate of the ward. The interim guardian shall not be required to post a bond. No multidisciplinary evaluation shall be ordered in any proceedings for the appointment of an interim guardian.

(e) The petitioner seeking an interim guardianship must also simultaneously file a petition under G.S. 35-1.10 for the adjudication of incompetence and may voluntarily dismiss the petition for adjudication of incompetence and for interim guardianship only before the hearing on the petition for interim guardianship.

(f) After entering his order on the petition for adjudication of incompetency, the clerk shall dismiss the petition for interim guardianship.

(g) The guardian ad litem appointed to represent the respondent in a petition for interim guardianship may waive his right to notice under G.S. 1A-1, Rules of Civil Procedure, Rule 17. (1977, c. 725, s. 1; 1979, c. 751, ss. 9-13, 31.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote subsections (b), (c) and (d) and added subsections (e), (f) and (g).

§ 35-1.16. Rights to counsel, evaluation, and jury; hearing on petition.

(a) Right to Counsel. — The respondent is entitled to be represented by counsel of his own choice or by court-appointed counsel or guardian ad litem.

If the petition filed under G.S. 35-1.10 alleges that the respondent is indigent, and no counsel or guardian ad litem has been appointed under G.S. 35-1.15, the clerk shall immediately appoint counsel to represent him or if it is not alleged that the respondent is indigent and he fails to employ counsel before the hearing, the clerk shall immediately appoint counsel or guardian ad litem to represent him.

If the respondent for whom counsel has been appointed seeks to waive the right to counsel and if the clerk determines at the hearing on the petition that he lacks capacity to waive the right to counsel but does not want counsel, the clerk shall appoint a guardian ad litem, pursuant to G.S. 1A-1, Rules of Civil Procedure, Rule 17.

The fees of court-appointed counsel and guardians ad litem shall be borne by the Administrative Office of the Courts unless the clerk finds that the respondent is incompetent and not indigent, in which case the fees of court-appointed counsel or guardian ad litem shall be a proper charge against the respondent.

(b) Right to Multidisciplinary Evaluation. — The clerk, the respondent, his counsel or the guardian ad litem, or the petitioner may require a multidisciplinary evaluation of the ward to be performed and filed in the proceedings. If no such evaluation is requested, none shall be performed. Upon a motion of the respondent or on his own motion, the clerk may for good cause deny the petitioner's request for a multidisciplinary evaluation.

The request by the petitioner, respondent, or his counsel or guardian ad litem for a multidisciplinary evaluation shall be made in writing filed with the clerk. They shall make their request within 10 days after the petition is filed, or after counsel has filed his appearance or the guardian ad litem has been appointed, whichever is later.

If a multidisciplinary evaluation is requested, the clerk shall name a designated agency and order it to prepare or cause to be prepared or to assemble a current multidisciplinary evaluation of the respondent. The agency shall file the report of the evaluation with the clerk and shall send copies to the petitioner and the respondent not later than 30 days after the agency receives the order of the clerk. The clerk may order an extension of the 30-day period upon good cause shown by the agency.

Upon receipt of the report of the multidisciplinary evaluation, the clerk shall set a time, date, and place for a hearing to determine whether the respondent is incompetent and shall notify all interested parties of the time, date, and place for the hearing.

The cost of the multidisciplinary evaluation shall be borne by the respondent unless he is indigent, in which case it shall be borne by the Department.

The respondent may obtain other evaluations at his own expense. If the clerk finds that the respondent is indigent and if the respondent requests that he be evaluated by other mental health or mental retardation professionals, the clerk, upon good cause shown, may order that the respondent be so evaluated. The cost of those evaluations shall be borne by the Department.

The report of the multidisciplinary evaluation and other evidence, if any, shall be considered at the hearing held by the clerk.

If no multidisciplinary evaluation has been requested, the clerk shall proceed with the hearing as set out in the original notice of hearing issued by him pursuant to G.S. 35-1.13.

The hearing shall be held no earlier than seven and no later than 30 days after notice of the hearing is served and not before the clerk receives the multidisciplinary evaluation, if any.

Upon disposition of the proceedings before the clerk or any appeal, the clerk shall send all copies of the multidisciplinary evaluation to the designated public agency, which shall file them among its records on the ward.

If a multidisciplinary evaluation does not contain medical, psychological, or social work evaluations, the designated agency nevertheless shall file it with the clerk and send copies to the petitioner and respondent and, in its report or in a transmittal letter, explain why the evaluation does not contain medical, psychological, or social work evaluations.

The clerk may not issue an order requiring that the respondent be taken into custody for the purpose of being evaluated.

(c) Right to Jury Trial. — At the hearing, the respondent has a right, upon request by him, his counsel, or the guardian ad litem, to trial by jury. The respondent, his counsel, or the guardian ad litem may waive the right to trial by jury by written notice filed with the clerk. If none of them request trial by jury, the clerk may nevertheless require trial by jury under G.S. Chapter 1A, Rules of Civil Procedure, Rule 39(b) by entering an order for trial by jury on his own motion. The jury shall be composed of 12 persons chosen from the jury list of the county in accordance with the provisions of Chapter 9 of the General Statutes.

(d) Open Hearings. — The hearing shall be open to the public unless the respondent, his counsel, or the guardian ad litem requests otherwise. The record of the hearing, including without limitation any documentary testimony introduced at the hearing and the report of the multidisciplinary evaluation, shall be open to the public unless, for good cause shown, the clerk, upon petition of the respondent, his counsel, or the guardian ad litem, orders otherwise.

(e) Right to Present Evidence. — The petitioner and the respondent are entitled to present oral testimony or documentary evidence at the hearing, subpoena witnesses and the production of documents, and examine and cross-examine witnesses.

(f) Clerk's Finding. — If the clerk or jury shall find by the greater weight of the evidence that the respondent is an incompetent adult, the clerk shall appoint a guardian pursuant to G.S. 35-1.17. If the clerk or jury does not so find, the clerk shall dismiss the petition.

(g) Clerk's Order. — After considering all the evidence and having found the respondent is an incompetent adult, the clerk may enter an order setting forth:

(1) Findings on the nature and extent of the ward's incompetency;

(2) The powers and duties of the guardian or guardians regarding the person or the estate of the ward, or both; such powers and duties shall include, unless the clerk provides to the contrary, the powers and duties of guardians with respect to the person, as provided under G.S. 35-1.34, and with respect to the estate, as provided under G.S. 35-1.35. The clerk may order that the ward retains certain legal rights and privileges to which he was entitled before he was adjudged incompetent; and

(3) Whether there shall be one or more guardians, his or their identity, and, if more than one, who shall be guardian of the person and who shall be guardian or guardians of the estate. (1977, c. 725, s. 1; 1979, c. 751, ss. 14-17, 31; 1981, c. 492.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section.

The 1981 amendment, applicable to hearings petitioned for on or after June 2, 1981, substituted "no earlier than seven and no later than 30" for "not less than 10" in the ninth paragraph of subsection (b) and deleted "the" preceding "notice" in that paragraph.

§ 35-1.17. Hearing before clerk on appointment of guardian.

For the purposes of determining who the guardian or guardians shall be, the clerk shall receive whatever testimony is offered at the conclusion of the adjudication of incompetency proceeding. For good cause shown, the clerk may transfer the appointment of a guardian and the guardianship to any county identified in G.S. 35-1.8. Upon transfer, the transferring clerk shall enter a written order authorizing the same. The order shall further state the appropriate person to be appointed guardian as determined at the aforesaid hearing. This order along with a certified copy of the adjudication papers shall be sent to the clerk of the transferee county and set up in the estates division as a basis for the guardian's application, appointment, and qualification. (1977, c. 725, s. 1; 1979, c. 751, s. 18.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section, which formerly read: "For the purposes of determining who the guardian or guardians shall be, the clerk shall receive whatever testimony is offered."

§ 35-1.18. Clerk to issue letters of appointment.

The clerk shall issue to the guardian or guardians letters of appointment signed by him and sealed with his seal of office. In all cases, the clerk shall specify in his order whether the guardian, or, if there is more than one guardian, which of the guardians, shall be entitled to and have control of the ward's estate. (1977, c. 725, s. 1.)

§ 35-1.19. Bond.

The Secretary of the Department of Human Resources shall require, or purchase, in such amounts as he deems adequate and proper, individual or blanket bonds for all disinterested public agents appointed to be guardians, as provided by G.S. 35-1.28(d), and whether they serve as guardians of the estate, of the person, or of both, or one blanket bond covering all such agents, such bond or bonds to be conditioned upon faithful performance of their duties as guardians and made payable to the State. The premiums shall be paid by the State.

In all cases in which the clerk appoints a general guardian or a guardian of the estate, the clerk shall require the guardian to post a bond as provided by Chapter 33, Article 2. The clerk shall not require a guardian of the person to post a bond. (1977, c. 725, s. 1; 1979, c. 751, s. 19.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote the second paragraph, which formerly read: "In all cases in which the clerk appoints a general guardian or a guardian of the person, the clerk shall require the guardian to post a bond in the minimum amount of two thousand dollars ($2,000). The clerk shall require the guardian of the estate to post a bond as provided by Chapter 33, Article 2."

§ 35-1.20. Appeals from clerk's orders.

Appeals from the clerk shall be to the superior court de novo and thence to the Court of Appeals. An appeal does not stay the appointment of a guardian unless so ordered by the superior court or the Court of Appeals. The Court of Appeals may request the Attorney General to represent the petitioner on appeal. (1977, c. 725, s. 1.)

§§ 35-1.21 to 35-1.27: Reserved for future codification purposes.

Part 5. Qualifications, Priorities, Duties, and Liabilities of Guardians.

§ 35-1.28. Qualifications of guardians.

(a) The clerk may appoint as guardian an individual, a domestic corporation, or a disinterested public agent. The person filing the petition may submit to the clerk a name or names of potential guardians.

(b) An individual to be appointed as a guardian shall be a resident of the State of North Carolina.

(c) A corporation that serves as a guardian shall be authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) A disinterested public agent who is appointed by the clerk to serve as a guardian is authorized and required to do so. When the person ceases to qualify as a disinterested public agent, the clerk shall appoint a successor guardian. No public agent shall be appointed guardian until exhaustive efforts have been made to find individuals or corporations to be guardians. (1977, c. 725, s. 1.)

§ 35-1.29. Priorities for appointment.

The clerk shall consider appointing a guardian according to the following order of priority: an individual; a corporation; or a disinterested public agent. (1977, c. 725, s. 1.)

§ 35-1.30. Rule-making power of Secretary of Human Resources.

The Secretary of the Department of Human Resources has the authority to issue rules and regulations for the implementation of the guardianship responsibilities of disinterested public agents who are appointed guardians. The rules and regulations shall provide, among other things, that disinterested public agents shall undertake or have received training concerning the powers and responsibilities of guardians. They shall also set forth uniform statewide accounting procedures for disinterested public agents appointed guardians. (1977, c. 725, s. 1.)

§ 35-1.31. Status reports.

(a) Within six months after he is appointed, the general guardian or guardian of the person shall file an initial status report with the designated agency, if an agency has been appointed. The general guardian or guardian of the person shall file his second status report with the designated agency one year after he is appointed, and he shall file all subsequent reports with the designated agency annually thereafter.

(b) The general guardian or guardian of the person shall file each status report under his oath or affirmation that the report is complete and accurate so far as he is informed and can determine.

(c) The designated agency shall not make the status reports available to anyone other than the guardian, the ward, or State or local human resource agencies providing services to the ward. (1977, c. 725, s. 1; 1979, c. 751, s. 20.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section.

§ 35-1.32. Duties of designated agency.

(a) Within 30 days after it receives a status report, the designated agency shall certify to the clerk that it has reviewed the report and shall mail a copy of its certification to the guardian.

(b) At the same time, it may

(1) Send its written comments on the report to the clerk, the guardian, or any other person who may have an interest in the ward's welfare;

(2) Notify the guardian that it is able to help the guardian in the performance of his duties;

(3) Petition the clerk for an order requiring the guardian to perform the duties imposed on him by the clerk or this Article if it appears that the guardian is not performing those duties;

(4) Petition the clerk for an order modifying the terms of the guardianship or the guardianship program or plan if it appears that such should be modified;

(5) Petition the clerk for an order removing the guardian from his duties and appointing a successor guardian if it appears that the guardian should be removed for cause;

(6) Petition the clerk for an adjudication of restoration to competency pursuant to G.S. 35-1.39; or

(7) Petition the clerk for any other appropriate orders.

(c) If the designated agency files such a petition, it shall cause the petition to be signed and acknowledged by the officer, official, employee, or agent who has personal knowledge of the facts set forth in the petition, and it shall set forth all facts known to it that tend to support the relief sought by the petition.

(d) The clerk shall take action upon the petition pursuant to the provisions of G.S. 35-1.37, 35-1.38, and 35-1.39. (1977, c. 725, s. 1; 1979, c. 751, ss. 21, 22.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, deleted "either a financial or" which previously preceded "status report" and deleted "from a guardian" which previously followed "status report" in subsection (a), and substituted "G.S. 35-1.39" for "G.S. 35-1.38" in subdivision (b)(6).

§ 35-1.33. Procedure to compel status reports.

The procedures for compelling the guardian to file status reports is the same as set forth in G.S. 35-1.35 with respect to compelling the guardian to file financial reports. (1977, c. 725, s. 1.)

§ 35-1.34. General powers and duties of guardians with respect to the person.

(a) A guardian of the person or general guardian has the following powers and duties:

(1) To the extent that it is not inconsistent with the terms of any order by a court of competent jurisdiction relating to the admission, detention, or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of domicile within or without this State. In arranging for a place of domicile, the guardian shall give preference to places within this State over places not within this State if both in- and out-of-state places are substantially equivalent. He also shall give preference to places that are not treatment facilities; if the only available and appropriate places of domicile are treatment facilities, he shall give preference to community-based treatment facilities, such as group homes or nursing homes, over treatment facilities that are not community-based, such as residential hospitals for the mentally ill as established and provided for by Article 1 of Chapter 122 or residential centers for the mentally retarded as established and provided for by Article 9 of Chapter 122.

(2) He shall make provision for the care, comfort, and maintenance of his ward and shall arrange for his training, education, employment, and rehabilitation or habilitation. He shall take reasonable care of his ward's personal property.

(3) He may commence and defend against any judicial action in the ward's name.

(4) He may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service. He also may give any other consent or approval that may be required or desirable. He may petition the clerk for the clerk's concurrence in the consent or approval.

He may not, however, consent to the sterilization of a mentally ill or mentally retarded ward, which sterilization may be performed legally only after compliance with Chapter 35, Article 7.

(b) A guardian of the person is entitled to be reimbursed out of the ward's estate for expenditures incurred in the performance of his duties.

(c) The guardian of the person and a general guardian shall not be liable, by reason of his authorizing or giving any consent or approval necessary to enable the ward to receive legal, psychological, or other professional care, counsel, treatment, or service or other consent or approval that may be required or desirable, for damages to the ward or his estate resulting from the negligence or other acts of a third person if the guardian has acted within the limits imposed on him by this Article or the clerk or both. A guardian of the person and a general guardian shall not be liable for damages to the ward or his estate by reason of authorizing medical treatment or surgery for his ward if the guardian acted after consulting with the ward's physician, acted in good faith, was not negligent, and acted within the limits imposed on him by this Article or the clerk or both. (1977, c. 725, s. 1; 1979, c. 751, s. 23.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, added the last sentence of subdivision (a)(4).

§ 35-1.35. Powers and duties of guardians with respect to the estate.

A general guardian and a guardian of the estate shall have all the powers and duties under Articles 2, 3, 4, 5, 5A, 5B, and 5C of Chapter 35 of the General Statutes and by Articles 2, 3, 4, and 5 of Chapter 33 of the General Statutes unless the provisions of this Chapter are inconsistent therewith, in which case the provisions of this Chapter shall prevail, or unless the provisions of the order of the clerk appointing a guardian are inconsistent therewith, in which case the provisions of the clerk's order shall prevail. A general guardian or a guardian of the estate shall file his inventories, accounts, and financial reports with the clerk who appointed him at the times and in the manner required by G.S. 33-36, G.S. 33-39, and G.S. 33-41, and the clerk shall file those reports in the appropriate estate file. (1977, c. 725, s. 1; 1979, c. 751, s. 24.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, added the second sentence.

§ 35-1.36. Guardian's financial reports' costs.

The cost of filing financial reports shall be a proper charge against the ward's estate but, if the ward has no estate or has an estate with a value of less than two thousand dollars ($2,000) at the time a guardian files a report, the clerk may waive the cost of filing. (1977, c. 725, s. 1; 1979, c. 751, s. 25.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section, which formerly read: "A guardian shall simultaneously file with the designated agency all reports that he is required to file with the clerk."

§ 35-1.37. Clerk's continuing jurisdiction over guardians.

(a) Upon appointment of a guardian, the clerk shall retain jurisdiction of the matter in order to assure compliance with his orders and those of the superior court. He shall have authority to remove a guardian for cause and he shall appoint a successor guardian after removal, death, or resignation of a guardian. He shall have authority to determine disputes between guardians and to adjust the amount of the guardian's bond.

(b) The clerk shall follow the criteria set forth in G.S. 35-1.28 and 35-1.29 in appointing a successor guardian.

(c) Any party to the original proceeding and any other interested person may petition the clerk to exercise the authority conferred on him by this section. (1977, c. 725, s. 1.)

§ 35-1.38. Clerk's continuing jurisdiction over proceedings.

(a) Any interested person may petition the clerk in the county where the guardian was appointed for modification of his order or for consideration of any matter pertaining to the guardianship.

(b) The clerk may order a multidisciplinary evaluation or other evaluation to be made upon the filing of a petition for subsequent proceedings.

(c) The clerk shall treat all petitions for subsequent proceedings filed under this section as motions in the cause.

(d) The petitioner shall obtain from the clerk a time, date, and place for a hearing on the petition, and shall notify the appropriate persons of the hearing on the petition by mailing a copy of the notice and petition at least 10 days prior to the date of the hearing.

(e) If an emergency exists that threatens the physical well-being of the ward, the clerk may enter ex parte an appropriate order pending disposition of the matter at the hearing. (1977, c. 725, s. 1; 1979, c. 751, s. 26.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote subections (a), (b) and (c) and added subsections (d) and (e).

§ 35-1.39. Proceedings to restore ward to competency.

(a) The guardian, ward, or any other interested person may file a petition with the clerk who appointed the guardian for the restoration of the ward to competency.

(b) Upon receipt of the petition, the clerk shall set a time, date, and place for a hearing. The petitioner shall cause notice to be served on the guardian and ward (unless one of them is the petitioner) and any other parties to the adjudication proceedings. Notice shall be served in accordance with the provisions of Rule 4.

(c) The clerk shall treat the petition for restoration to competency as a special proceeding.

(d) At the hearing on the petition, the ward shall be entitled pursuant to G.S. 35-1.16(a) to be represented by counsel or a guardian ad litem and the clerk shall appoint counsel or a guardian ad litem if the ward is indigent, upon request shall be entitled pursuant to G.S. 35-1.16(b) to a multidisciplinary evaluation, upon request shall be entitled pursuant to G.S. 35-1.16(c) to trial by jury except that the jury shall be a jury of six persons selected in accordance with the provisions of G.S. Chapter 9, shall be entitled pursuant to G.S. 35-1.16(d) to an open hearing, and shall be entitled pursuant to G.S. 35-1.20 to appeal the clerk's decision to the superior court de novo.

(e) If the clerk or jury shall find that the ward is not an incompetent adult, the clerk shall enter an order adjudicating that the ward is restored to competency and, upon the clerk's receipt and approval of a proper final account from the guardian, discharge the guardian. (1977, c. 725, s. 1; 1979, c. 751, s. 27.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section.

§ 35-1.40: Reserved for future codification purposes.

Part 6. Testamentary Appointment of Guardians.

§ 35-1.41. Testamentary appointment.

(a) Any person authorized by law to appoint a guardian for a minor by his last will and testament or other writing may direct that the guardian appointed by him for his incompetent child shall petition the clerk at any time during the six months before the child reaches majority for appointment of a guardian under the provisions of this Article. If so directed, the guardian shall timely file such a petition. Notwithstanding the absence of such provision, a guardian appointed by a last will and testament or other writing for an incompetent child may petition the clerk at any time during the six months before the child reaches majority, or thereafter, for the appointment of a guardian under the provisions of this Article.

(b) A testamentary guardian who files such a petition shall set forth his desire to be appointed or not as guardian. Such a guardian shall be considered by the clerk if the guardian desires to serve.

(c) Notwithstanding the appointment of a testamentary guardian for a minor, any person may petition for the appointment of a guardian for an incompetent child under this Article six months or less before the child reaches majority. (1977, c. 725, s. 1.)

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§ 35-2. Appointment of guardian.

Any person, in behalf of one who is deemed an incompetent from want of understanding to manage his own affairs or inebriate by reason of the excessive use of intoxicating drinks, may file a petition before the clerk of the superior court of the county where such person resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the person, to the sheriff of the county, commanding him to summon a jury of 12 men to inquire into the state of such person. Upon the return of the sheriff summoning said jury, the clerk of the superior court shall swear and organize said jury and shall preside over said hearing, and the jury shall make return of their proceedings under their hand to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be inebriate or incompetent by inquisition of a jury, as in cases of orphans. The clerk shall appoint a guardian ad litem to represent the supposed inebriate or incompetent person.

Either the applicant or the ward may appeal from the finding of said jury to the next session of the superior court, when the matters at issue shall be regularly tried de novo before a jury, and pending such appeal, the clerk of the superior court shall not appoint a guardian for the said person, but the resident judge of the district, or the judge presiding in the district, may in his discretion appoint a temporary receiver for the alleged incompetent pending the appeal. The trial of said appeal in the superior court shall have precedence over all other causes.

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be inebriate or incompetent by inquisition of a jury as in cases of orphans. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee or guardian administering an estate for any person shall be subject to all the laws governing the administration of estates of minors and incompetents. The clerks of superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance.

If a petition for adjudication of incompetency has been filed against the respondent, alleging him to be mentally ill, under the provisions of Chapter 35, Article 1A, and the petition has been dismissed after a hearing on the merits, the clerk on his own motion may dismiss a petition filed under this Article or this section against the same person, alleging him to be mentally ill, unless the petition alleges substantially new facts, not previously alleged in the Article 1A proceeding, tending to prove that he is incompetent, as defined in this Article, because of mental illness. (C. C. P., s. 473; Code, s. 1670; Rev., s. 1890; 1919, c. 54; C. S., s. 2285; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3; 1951, c. 777; 1971, c. 528, s. 31; 1977, c. 725, s. 5; 1979, c. 751, ss. 32, 33.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, in the first paragraph, substituted "an" for "a mental defective, inebriate, or mentally disordered, or" following "deemed," deleted "or other cause" following "use of intoxicating drinks," deleted "supposed mental defective, inebriate or mentally disordered" following "where such" and following "upon notice to the" and inserted "or inebriate" following "manage his own affairs," in the first sentence of the first paragraph. In the second sentence of the first paragraph the amendment deleted "a mental defective" following "found to be," "mentally disordered" following "inebriate," and "person" following "or incompetent." The amendment also added the third sentence of the first paragraph. In the first sentence of the second paragraph, the amendment substituted "ward" for "supposed mental defective, inebriate, mentally disordered, or incompetent person" and deleted "supposed mental defective, inebriate, mentally disordered, or incompetent" following "guardian for the said." In the first sentence of the third paragraph, the amendment deleted "a mental defective" following "found to be," "mentally disordered" following "inebriate," and "person" following "incompetent."

The 1979 amendment, effective Jan. 1, 1980, deleted in the third paragraph, four sentences which previously followed the first sentence and which related to commitment of inebriates. In the present third sentence of the third paragraph, the amendment substituted "administering an estate for any person" for "appointed shall be vested with all the powers of a guardian administering an estate for any person and." The amendment also added the last paragraph.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

Legal Periodicals. — For a survey of 1977 law on health care regulation, see 56 N.C. L. Rev. 857 (1978).

CASE NOTES

Proceeding under § 122-58.7 and This Section Distinguished. — It is true that both the class of persons subjected to involuntary commitment proceedings under § 122-58.7 and the class of persons subjected to the appointment of a guardian under this section may have mental problems. However, it is at that point that the similarity ends. The standards and purposes of the proceedings to commit someone who is mentally ill or an inebriate and imminently dangerous to himself or others are entirely different from the standards and purposes of the appointment of a guardian to one who is found incapable of handling his own affairs. What exists here is the State giving a jury trial to those persons for whom a guardian is being appointed and not to those persons being involuntarily committed. There is no violation of the equal protection clause. French v. Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977).

Cited in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 35-2.1. Guardian appointed when issues answered by jury in any case.

When a jury in the trial of any civil or criminal case shall find, in answer to appropriate issues, that a person is without sufficient mental capacity to conduct business, it shall have the same effect as an adjudication before the clerk of the superior court and the clerk may forthwith appoint a guardian or trustee for the person so adjudged incompetent. (1945, c. 96; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, deleted "insane or" preceding "without sufficient mental capacity" and preceding "incompetent."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-3: Repealed by Session Laws 1979, c. 152, effective October 1, 1979.

§ 35-3.1. Ancillary guardian for insane or incompetent nonresident having real property in State.

Whenever it shall appear by petition, application, and due proof to the satisfaction of any clerk of the superior court of North Carolina that:

(1) There is real property situate in the county of said clerk in which a nonresident of the State of North Carolina has an interest or estate;

(2) That said nonresident is incompetent and that a guardian has been appointed and is still serving for him or her in the state of his or her residence; and

(3) That such incompetent nonresident has no guardian in the State of North Carolina;

Such clerk of the superior court before whom such petition, application and satisfactory proof is made shall thereupon be fully authorized and empowered to appoint in his county an ancillary guardian, which guardian shall have all the powers, duties and responsibilities with respect to the estate of said incompetent, in the State of North Carolina as guardians otherwise appointed now have; and such ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of said real estate, or any proceeds of sale, to the guardian of the state of residence of said incompetent.

A transcript of the record of any court of record appointing a guardian of a nonresident in the state of his residence shall be conclusive proof of the fact of incompetency and of the appointment of such guardian of the residence of the incompetent. Provided, that such transcript shall show that such guardianship is still in effect in the state of the ward's residence, and that the incompetency of the ward still exists.

Upon the appointment of an ancillary guardian in this State under this Article, the clerk of the superior court shall forthwith notify the clerk of the superior court of the county of the ward's residence, and shall also notify the guardian in the state of the ward's residence. (1949, c. 986; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, deleted "insane or" preceding "incompetent" in subdivision (2), deleted "or insane" following "incompetent" in subdivision (3), deleted "insane person, or" preceding "incompetent" in two places in the second paragraph and in the first sentence of the third paragraph, and deleted "or insanity" following "incompetency" in the first sentence of the third paragraph.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-4. Restoration to sanity or sobriety; effect; how determined; appeal.

When any insane person or inebriate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or inebriate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence; provided, however, that in all cases where a guardian has been appointed the cause of action shall be tried in the county where the guardianship is pending, and said guardian shall be made a party to such action before final determination thereof, setting forth the facts, duly verified by the oath of the petitioner (the petition may be filed by the person formerly adjudged to be insane, lunatic, inebriate or incompetent; or by any friend or relative of said person; or by the guardian of said person), whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or inebriate, to the sheriff of the county, commanding him to summon a jury of six people chosen in accordance with the provisions of Chapter 9 to inquire into the sanity of the alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an inebriate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an inebriate, as the case may be, the said person is authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or inebriate. The petitioner may appeal from the finding of said jury to the next session of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (1879, c. 324, s. 4; Code, s. 1672; 1901, c. 191; 1903, c. 80; Rev., s. 1893; C. S., s. 2287; 1937, c. 311; 1941, c. 145; 1949, c. 124; 1955, c. 691; 1971, c. 528, s. 31; 1979, c. 751, s. 34.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "six people chosen in accordance with the provisions of Chapter 9" for "six freeholders" in the first sentence.

§ 35-6. Estates without guardian managed by clerk.

When any person is declared to be incompetent or inebriate and no suitable person will act as his guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed. (1846, c. 43, s. 1; R. C., c. 57, s. 6; Code, s. 1676; Rev., s. 1894; C. S., s. 2289; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "of nonsane mind."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-7: Repealed by Session Laws 1977, c. 102, s. 1.

Editor's Note. — Session Laws 1977, c. 102, s. 4, provides: "This act shall not affect pending litigation."

§ 35-8. Renewal of obligations by guardians.

In all cases where a guardian has been appointed for a person and said person is the maker or one of the makers, a surety or one of the sureties, an indorser or one of the indorsers of any note, bond, or other obligation for the payment of money, which is due or past due at the time of the appointment of the guardian, or shall thereafter become due prior to the settlement of the estate of said ward, the guardian of said ward's estate is hereby authorized and empowered to execute, as such guardian, a new note, bond, or other obligation for the payment of money, in the same capacity as the ward was obligated, for the same amount or less, but not greater than the sum due on the original obligation. Such new note shall be in lieu of the original obligation of the ward, whether made payable to the original holder or to another. Such guardian is authorized and empowered to renew said note, bond, or other obligation for the payment of money from time to time; and said note, bond, or other obligation so executed by such guardian shall be binding upon the estate of said ward to the same extent and in the same manner and with the same effect that the original bond, note, or other obligation executed by the ward was binding upon his estate: Provided, the time for final payment of the note, bond, or other obligation for the payment of money, or any renewal thereof by said guardian shall not extend beyond a period of two years from the qualification of the original guardian as such upon the estate of said ward. (1927, c. 45, s. 1; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, deleted "who has been judicially declared to be an inebriate, lunatic, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicating drink or other causes" following "appointed for a person" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-9. Guardian not liable.

The execution of any note, bond or other obligation for the payment of money mentioned in G.S. 35-8 by the guardian, shall not be held or construed to be binding upon the said guardian personally. (1927, c. 45, s. 2; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, deleted "of the inebriate, lunatic, or incompetent" following "by the guardian."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 3.

Sales of Estates.

§ 35-10. Clerk may order sale, renting or mortgage.

When it appears to any clerk of the superior court by report of the guardian of any inebriate or person found incompetent that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale, mortgage or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. The procedure for any sale made pursuant to this section shall be as provided by Article 29A of Chapter 1 of the General Statutes. Any order made under the authority of this section for the sale, mortgage or renting of real estate, or both real and personal property, shall be made by and all proceedings shall be had before the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order applied for is for the sale, mortgage or renting of personal property, then said order may be made and the proceedings may be had before the clerk of the superior court of the county in which all or any part of the personal property is situated; such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale or mortgage, and shall be entered at length on the records of the court and all sales and rentings and conveyances by mortgages or deeds in trust made under this section shall be valid to convey the interest and estate directed to be sold or conveyed by mortgage or deed in trust, and the title thereof shall be conveyed by a commissioner to be appointed by the clerk; or the clerk may direct the guardian to file his petition for such purpose. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. (1801, c. 589; R. C., c. 57, s. 4; Code, s. 1674; Rev., s. 1896; C. S., s. 2291; 1931, c. 184, s. 1; 1945, c. 426, s. 3; c. 952, s. 4; c. 1084, s. 3; 1949, c. 719, s. 2; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, in the first sentence, deleted "mental defective" following "guardian of any" and substituted "person found incompetent" for "mentally disordered person."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

CASE NOTES

Quoted in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 35-10.1. Abandoned incompetent spouse.

(a) A guardian of a married person found incompetent who has been abandoned, whether the guardian was appointed before or after the abandonment, may initiate a special proceeding before a clerk of superior court requesting the issuance of an order authorizing the sale of the ward's separate real property without the joinder of the abandoning spouse.

(b) The special proceeding shall be brought before a clerk of superior court having jurisdiction over the ward under the provisions of G.S. 35-1.8.

(c) The ward's spouse shall be served with notice of the special proceeding in accordance with G.S. 1A-1, Rule 4.

(d) If the clerk finds:

(1) That the spouse of the ward has willfully and without just cause abandoned the ward for a period of more than one year; and

(2) That the spouse of the ward has knowledge of the guardianship, or that the guardian has made a reasonable attempt to notify the spouse of the guardianship; and

(3) That an order authorizing the sale of the separate real property of the ward is in the best interest of the ward,

the clerk may issue such an order thereby barring the abandoning spouse from all right, title and interest in any of the ward's separate real property sold pursuant to such an order. (1979, c. 100, s. 1.)

Editor's Note. — Session Laws 1979, c. 100, s. 2, makes this section effective Oct. 1, 1979.

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.

When it appears to the clerk, upon the petition of the guardian of any inebriate or person found incompetent, that a sale or mortgage of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance, or when the clerk is satisfied that the interest of the inebriate or person found incompetent would be materially and essentially promoted by the sale or mortgage of any part of such estate; or when any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge. The clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such person with mental disorder or inebriate. And if on the hearing the clerk orders such sale or mortgage, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the Chapter entitled Guardian and Ward. The word "mortgage" whenever used herein shall be construed to include deeds in trust. All petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of real estate, both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real estate is situated; if the order of sale sought in the petition is for the sale or mortgage of personal property, the petition shall be filed in the office of the clerk of the superior court of the county in which any or all of such personal property is situated. The procedure for any sale made pursuant to this section shall be provided by Article 29A of Chapter 1 of the General Statutes. (R. C., c. 57, s. 5; Code, s. 1675; Rev., s. 1897; C. S., s. 2292; 1931, c. 184, s. 2; 1945, c. 426, s. 4; c. 952, s. 5; c. 1084, s. 4; 1949, c. 719, s. 2; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "inebriate or person found incompetent" for "mental defective, inebriate or mentally disordered person" in two places in the first sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

CASE NOTES

Quoted in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

§ 35-13. Spouse of incompetent husband or wife entitled to special proceeding for sale of property.

Every married person whose husband or wife is adjudged incompetent and is confined in a mental hospital or other institution in this State, and who was living with the incompetent spouse at the time of commitment shall, if he or she be in needy circumstances, have the right to bring a special proceeding before the clerk of the superior court to sell the property of the incompetent spouse, or so much thereof as is deemed expedient, and have the proceeds applied for support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the judicial district where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the incompetent spouse is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1911, c. 142, ss. 1, 2; C. S., s. 2294; 1977, c. 102, s. 2.)

Effect of Amendments. — The 1977 amendment, in the first sentence, substituted "married person whose husband or wife is adjudged incompetent" for "woman whose husband is a lunatic or insane," "a mental hospital or other institution" for "an asylum," "incompetent spouse at the time of commitment shall, if he or" for "her husband at the time he was committed to such asylum, if she," "the incompetent spouse" for "her insane husband," and "for support" for "to her support" and deleted "shall" following "be in needy circumstances." In the second sentence, the amendment substituted "incompetent spouse" for "insane husband."

Session Laws 1977, c. 102, s. 4, provides: "This act shall not affect pending litigation."

ARTICLE 5.

Surplus Income and Advancements.

§ 35-19. Income of incompetent surviving spouse used for children's support.

When a parent dies leaving surviving minor children and a surviving spouse who is the other parent of such children, but leaving no sufficient estate for the support, maintenance and education of such minor children, and the surviving spouse is or becomes incompetent and is so declared according to law, and such incompetency continues for 12 months thereafter, and the incompetent person has an estate which is placed in the hands of a guardian or other person, as provided by law, the estate of such incompetent person shall be made liable for the support, maintenance and education of the minor children. The clerk of the superior court for the county in which the incompetent person has residence shall order that fit and proper advancements be made on behalf of the minor children. (1905, c. 546; Rev., s. 1899; C. S., s. 2295; 1977, c. 102, s. 3.)

Effect of Amendments. — The 1977 amendment, in the first sentence, substituted "parent" for "father," "surviving spouse who is the other parent" for "widow who is the mother," "surviving spouse is or becomes incompetent" for "mother is or becomes insane," "incompetency" for "insanity," "incompetent person" for "she" and for "insane mother," and "minor children" for "class of persons mentioned in said section to the same extent, in the same manner and under the same rules and regulations that applies to estates of fathers thereunder," and deleted "him" following "dies leaving," "and" following "sufficient estate for the support," and "in such cases as are provided for in G.S. 35-20" preceding "be made liable for the support." The amendment also added the present second sentence.

Session Laws 1977, c. 102, s. 4, provides: "This act shall not affect pending litigation."

§ 35-20. Advancement of surplus income to certain relatives.

When any incompetent person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any incompetent person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the superior court for the county in which such person resided prior to incompetency to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his incompetency, he contributed in whole or in part. (R. C., c. 57, s. 9; Code, s. 1677; Rev., s. 1900; C. S., s. 2296; Ex. Sess. 1924, c. 93; 1971, c. 528, s. 32; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "nonsane" near the beginning of the first and second sentences and substituted "incompetency" for "insanity" in two places in the second sentence.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-21. Advancement to adult child or grandchild.

When such incompetent person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessaries and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1925, c. 136, s. 1; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment substituted "incompetent" for "nonsane" near the beginning of the section.

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-23. Distributees to be parties to proceeding for advancements.

In every application for such advancements, the guardian of the incompetent person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (R. C., c. 57, s. 11; Code, s. 1679; Rev., s. 1902; C. S., s. 2298; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "nonsane."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

§ 35-24. Advancements to be equal; accounted for on death.

The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the incompetent person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (R. C., c. 57, s. 12; Code, s. 1680; Rev., s. 1903; C. S., s. 2299; 1977, c. 725, s. 5.)

Effect of Amendments. — The 1977 amendment, effective March 1, 1978, substituted "incompetent" for "nonsane."

Session Laws 1977, c. 725, s. 8, provides in part that the act shall apply only to appointments made on or after March 1, 1978.

ARTICLE 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

§ 35-36. Sterilization of mentally retarded in State institutions.

The parent or guardian of a mentally ill or mentally retarded person or the responsible director, or other public official performing the functions of such director, of any institution operated by the State of North Carolina is hereby authorized to petition the district court of the county in which such institution is located for the sterilization operation of any mentally ill or retarded resident or patient thereof as may be considered in the best interest of the mental, moral, or physical improvement of the resident or patient, or for the public good, provided, that no operation authorized in this section shall be lawful unless and until the provisions of this Article shall first be complied with. It shall be the responsibility of the State institution to provide or pay for the cost and expense of the operations authorized in this section for those persons residents or patients in State institutions. (1933, c. 224, s. 1; 1967, c. 138, s. 1; 1973, c. 1281; 1981, c. 102, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment added "The parent or guardian of a mentally ill or mentally retarded person, or" at the beginning of the first sentence and substituted "operated" for "supported wholly or in part" near the beginning of the first sentence.

Legal Periodicals. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

For comment on In re Sterilization of Moore, 289 N.C. 95, 221 S.E.2d 307 (1976), upholding the constitutionality of this Article, see 8 N.C. Central L.J. 307 (1977).

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Article Is Constitutional. — The legislative classification of mentally retarded persons is neither arbitrary nor capricious, but rests upon respectable medical knowledge and opinion that such persons are in fact different from the general population and may rationally be accorded different treatment for their benefit and the benefit of the public. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

All mentally retarded persons are sufficiently different from the general population to justify classification for some purposes without meeting the compelling governmental interest test. But the right to procreate is a fundamental one and under equal protection challenge sterilization cannot be ordered short of demonstrating a compelling governmental interest. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

This Article is narrowly drawn to express only the legitimate state interest of preventing the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent, and that so viewed, the State's interest rises to the dignity of a compelling one. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Application of Statute. — Though the sterilization statutes have been determined to meet the tests of constitutionality, the absence of standards and statutory definitions requires that the courts construe and apply the statutory provisions to the evidence in each case so as to adequately protect the respondent's fundamental rights. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980).

§ 35-37. Sterilization of mentally retarded not in State institutions.

The parent or guardian of a mentally ill or mentally retarded person, or the county director of social services, or other public official performing the functions of such director, is hereby authorized to petition the district court of his county for the sterilization operation of any mentally ill or retarded resident of the county, not a resident or patient of any State institution, or of any mentally ill or retarded person who is on parole from a State institution considered in the best interest of the mental, moral, or physical improvement of such resident, or for the public good, provided that no operation authorized in this section shall be lawful unless and until the provisions of this Article shall first be complied with. It shall be the responsibility of the board of commissioners of the respective counties to provide or pay for the cost and expense of the operations authorized in this section for those persons residents in their respective counties. (1933, c. 224, s. 2; 1961, c. 186; 1967, c. 138, s. 2; 1973, c. 1281; 1981, c. 102, s. 3.)

Effect of Amendments. — The 1981 amendment added "The parent or guardian of a mentally ill or mentally retarded person, or" at the beginning of the first sentence.

Legal Periodicals. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

§ 35-38. Who shall perform sterilization operations upon the mentally retarded.

Editor's Note. — The catchline to this section is set out to substitute "mentally retarded" for "mental defectives" pursuant to Session Laws 1979, c. 751, s. 30.

§ 35-39. Duty of petitioner.

It shall be the duty of such petitioner promptly to institute proceedings as provided by this Article in any of the following circumstances:

(1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, resident of an institution, or noninstitutional individual, that he or she be sterilized.

(2) When in his opinion it is for the public good that such patient, resident of an institution, or noninstitutional individual be sterilized.

(3) When in his opinion such patient, resident of an institution, or noninstitutional individual would be likely, unless sterilized, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency; or, because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would be unable to care for a child or children.

(4) Repealed by Session Laws 1981, c. 102, s. 4. (1933, c. 224, s. 4; 1935, c. 463, s. 1; 1937, c. 243; 1961, c. 186; 1967, c. 138, s. 4; 1969, c. 982; 1973, c. 476, s. 133.3; c. 1281; 1981, c. 102, s. 4.)

Effect of Amendments. — The 1981 amendment deleted subdivision (4), which read: "When requested to do so in writing by the next of kin or legal guardian of such patient, resident of an institution, or noninstitutional individual."

Legal Periodicals. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

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Constitutionality of Section Generally. — This section is not overly broad. Although it permits initiation of the sterilization procedure against any and all members of the class, it does not contemplate that all members of the class will be sterilized. Nor is the standard of selection so vague that it cannot be comprehended and applied. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

The legislative dual purpose—to prevent the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent—reflects a compelling state interest and the classification rests upon a difference having a fair and substantial relation to the object of the legislation and does not, therefore, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

The legislative classification is itself narrowed as to impact so that only mentally retarded persons who are sexually active, and unwilling or incapable of controlling procreation by other contraceptive means, and who are found to be likely to procreate a defective child, or who would be unable because of the degree of retardation to be able to care for a child, may be sterilized. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Subdivisions (1) through (3) make out a complete and sensible scheme: that the public servant concern himself either with the best interest of the retarded person or the best interest of the public, or both, and that he act to begin the procedure only when in his opinion the retarded person would either likely procreate a defective child or would himself be unable to care for his own child or children. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Former Subdivision (4) Unconstitutional. See North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

§ 35-40. Contents of petition.

Legal Periodicals. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

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Cited in In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980).

§ 35-41. Copy of petition served on patient.

Legal Periodicals. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

§ 35-43. Hearing before the judge of district court.

Legal Periodicals. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

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This section is procedurally adequate to survive challenge under the Due Process Clause of the Fourteenth Amendment. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Findings of Fact Required. — Before the district court judge may enter an order requiring that the operation be performed, he must make the findings of fact required by this section, which amounts to a judicial determination that the allegations contained in the petition are true. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

This section means that the judge must find that the subject is likely to engage in sexual activity without utilizing contraceptive devices and is therefore likely to impregnate or become impregnated. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

The statute does not limit unfitness to mental retardation. The term "physical, mental or nervous disease or deficiency" includes qualities other than diminished intelligence, and the range of retardation can vary from mild to severe. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980).

A presumption of unfitness founded solely on retardation is unwarranted. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980).

The statutory phrase "care for the child" is not defined, but the courts in construing the phrase must find whether the evidence establishes a minimum standard of care consistent with both state interest and fundamental parental rights. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980).

Prejudicial Comment on Procreation of Mentally Defective Child. — Where there was no allegation and no evidence to support a finding on the second ground, the likelihood of procreating a mentally defective child, but the judge, nevertheless, repeatedly gave instructions on that part of the statute and included in his final mandate an instruction that the jury answer the issue in favor of petitioner if it found that respondent would be likely, unless sterilized, to procreate a child who would probably have serious mental, physical, or nervous disease or deficiency, the instruction was erroneous and prejudicial to respondent. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

Prejudicial Comment on Effect of Sterilization Laws. — An explanation by the judge in his charge of the necessity and effect of laws authorizing sterilization could only result in prejudice to the respondent. It is very likely that it led the jury to believe that the judge felt it should answer the issue in favor of petitioner. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

Burden of Proof. —

The absence of statutory guidance for determining what constitutes proper care of a child and a person's inability to provide that care places on the courts the burden of requiring that the evidence establishes conclusively a compelling state interest before the fundamental right of procreation can be infringed. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980).

The petitioner has the burden of proving at least probable inability to provide a reasonable domestic environment for the child. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980).

The burden on the petitioner to show personality defects or traits of unfitness apart from retardation increases as the retardation ranges from severe to mild. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980).

This section means that before an order of sterilization can be entered, there must be finding from evidence that is clear, strong and convincing that the subject is likely to engage in sexual activity without using contraceptive devices and that either a defective child is likely to be born or a child born that cannot be cared for by its parent. North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Instruction on Burden of Proof. — Where the judge in his charge in effect, equated proof by clear, strong and convincing evidence and proof by the greater weight of the evidence, the instruction was error. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

The judge should not attempt to define the term "clear, strong and convincing" in his charge. Whether the evidence is clear, strong and convincing is for the jury to resolve. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

Relevant Evidence. — In an involuntary sterilization proceeding based on the ground that respondent because of mental deficiency would probably be unfit to care for a child, evidence concerning respondent's morals, sexual activity, and attitude toward birth control and her statements to a psychiatrist that in her youth she would get impatient and angry with children left in her care by her parents were relevant on the issues of fitness and care and whether respondent's condition was likely to improve materially. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 822 (1980).

§ 35-44. Appeals.

Legal Periodicals. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

§ 35-45. Right to counsel.

Legal Periodicals. — For note entitled "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

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Stated in North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Chapter 36.

Trusts and Trustees.

§§ 36-1 to 36-67: Repealed by Session Laws 1977, c. 502, s. 1, effective January 1, 1978.

Cross References. — For present provisions as to trusts and trustees, see Chapter 36A.

Editor's Note. — Repealed § 36-23.2 was amended by Session Laws 1977, c. 760.

Chapter 36A.

Trusts and Trustees.

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36A-90. Establishment of common trust funds.
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36A-100. Interest of trustee as beneficiary of life insurance or other death benefit sufficient to support inter vivos or testamentary trust.

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36A-107. Trustees in wills to qualify and file inventories and accounts.
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Article 9.

Alienability of Beneficial Interest; Spendthrift Trust.

36A-115. Alienability of beneficiary's interest; spendthrift trusts.

Editor's Note. — Session Laws 1977, c. 502, s. 3, provides: "Except as otherwise specifically provided, this act shall become effective January 1, 1978."

Where appropriate, the historical citations to sections in repealed Chapter 36, covering the same subject matter as this chapter, have been added to corresponding sections in this Chapter 36A.

ARTICLE 1.

Investment and Deposit of Trust Funds.

§ 36A-1. Definition.

(a) For the purpose of this Article, the word "fiduciary" shall be construed to include a guardian, personal representative, collector, trustee, or any other person charged with the duty of acting for the benefit of another party as to matters coming within the scope of the relationship between them.

(b) As used in subsection (a) above, the word "person" shall be construed to include an individual, a corporation, or any legal or commercial entity authorized to hold property or do business in the State of North Carolina. (1977, c. 502, s. 2.)

§ 36A-2. Investment; prudent man rule.

(a) In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent man of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills.

(b) Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended. (1870-1, c. 197; Code, s. 1594; 1885, c. 389; 1889, c. 470; Rev., ss. 1792, 1793; 1917, c. 6, s. 9; c. 67, s. 1; c. 152, s. 7; c. 191, s. 1; c. 269, s. 5; C. S., ss. 4018, 4018(a), 4019; Ex. Sess. 1921, c. 63; 1931, c. 257; 1933, c. 549, s. 1; 1935, c. 449; 1937, c. 14; 1943, c. 96; c. 473, ss. 1-3; 1945, c. 713; 1953, c. 620; 1959, c. 364, s. 2; c. 1015, s. 2; 1969, c. 861; 1971, c. 528, s. 34; c. 864, s. 17; 1973, c. 239, s. 1; 1975, cc. 40, 319; 1977, c. 502, s. 2.)

Legal Periodicals. — For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§ 36A-3. Terms of creating instrument.

(a) Nothing contained in this Article shall be construed as authorizing any departure from the express terms or limitations set forth in any will, agreement, court order, or other instrument creating or defining the fiduciary's powers and duties.

(b) A fiduciary holding funds for investment who is specifically directed or authorized by an instrument creating the fiduciary relationship to retain the stock of a bank or trust company that is a member of a bank holding company currently fully registered under an act of Congress entitled Bank Holding Company Act of 1956, as the same may be amended from time to time, shall be considered as being directed or authorized to retain the stock of such bank holding company. (1973, c. 1277; 1977, c. 502, s. 2.)

§ 36A-4. Power of court not restricted.

Nothing contained in this Article shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property. (1977, c. 502, s. 2.)

§ 36A-5. Applicability of provisions.

This Article shall govern fiduciaries acting under wills, agreements, court orders, and other instruments now existing or hereafter made. (1977, c. 502, s. 2.)

§ 36A-6. Employee trusts.

Pension, profit sharing, stock bonus, annuity, or other employee trusts established for the purpose of distributing the income and principal thereof to some or all of their employees, or the beneficiaries of such employees, shall not be invalid as violating any laws or rules against perpetuities, restraints on the power of alienation of title to property, or the accumulation of income; but such trusts may continue for such period of time as may be required by the provisions thereof to accomplish the purpose for which they were established. (1954, c. 8; 1977, c. 502, s. 2.)

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 36A-7. Applicability.

The provisions of this Article shall apply to fiduciary relationships in existence on January 1, 1978, or thereafter established. (1977, c. 502, s. 2.)

§§ 36A-8 to 36A-12: Reserved for future codification purposes.

ARTICLE 2.

Removal of Fiduciary Funds.

§ 36A-13. Removal of fiduciary funds from this State.

Unless the creating instrument contains an express prohibition or provides a method of removal, when any personal property in this State is vested in a resident trustee, guardian, or other fiduciary, the clerk of superior court of the county in which the fiduciary resides may, on petition filed for that purpose by the fiduciary, beneficiary, ward, or other interested person, order the said fiduciary or his personal representative to pay, transfer, and deliver the said property or any part of it, to a nonresident fiduciary appointed by a court of record in another state; provided the clerk of superior court finds that such removal is in accord with the express or implied intention of the settlor, would aid the efficient administration of the trust, or is otherwise in the best interests of the beneficiaries, and further provided that,

(1) No such order of any clerk of superior court shall be valid and in force until approved by the resident judge of said judicial district, or the judge holding court in such district; and

(2) No such order shall be made, in the case of a petition, until after a hearing, as to which notice of the application shall have been given to all persons interested in such property as required in other special proceedings; and

(3) Such order may be conditioned on the appointment of a fiduciary in the state to which the property is to be removed and shall be subject to such other terms and conditions as the clerk of superior court deems appropriate for protection of the property and interests of the beneficiaries, provided any North Carolina beneficiary may require that a bond be posted prior to such removal in an amount sufficient to protect his interest, the premium for which shall be charged against his interest. (1911, c. 161, ss. 1, 2; C. S., ss. 4020, 4021; 1977, c. 502, s. 2.)

Legal Periodicals. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§ 36A-14. Provision for discharge of resident fiduciary.

When any trustee, guardian, or other fiduciary in this State, shall pay over, transfer, or deliver any property in his hands or vested in him, under any order or decree made in pursuance of this Article, he shall be discharged from all responsibility therefor. (1911, c. 161, s. 3; C. S., s. 4022; 1977, c. 502, s. 2.)

§ 36A-15. Removal of fiduciary funds to this State.

A clerk of superior court upon petition of a foreign trustee, guardian, or other fiduciary or of any beneficiary, ward, or other interested party may appoint a local fiduciary to receive and administer fiduciary property then being administered in another state. A fiduciary appointed pursuant to this section may be required to give bond conditioned upon the faithful performance of his duties or to meet any other conditions required by a court in the other state before permitting removal of the fiduciary property to this State. (1977, c. 502, s. 2.)

§ 36A-16. Applicability.

The provisions of this Article shall not apply to proceedings begun before January 1, 1978. (1977, c. 502, s. 2.)

§§ 36A-17 to 36A-21: Reserved for future codification purposes.

ARTICLE 3.

Resignation, Removal, and Renunciation of Trustees.

§ 36A-22. Applicability of this Article.

(a) Except when otherwise provided by law, the term "trustee," as used in this Article, includes "trustees," "guardians," and other fiduciaries.

(b) The resignation, removal, and renunciation of personal representatives and collectors shall be governed by the provisions of Articles 5, 9, and 10 of Chapter 28A.

(c) The substitution of trustees in mortgages and deeds of trust shall be governed by the provisions of G.S. 45-10. (1977, c. 502, s. 2.)

§ 36A-23. Clerk's power to accept resignations.

The clerks of superior courts of this State have power and jurisdiction to accept the resignation of trustees and to appoint their successors in the manner provided by this Article. (1911, c. 39, s. 1; C. S., s. 4023; 1977, c. 502, s. 2.)

§ 36A-24. Petition; contents and verification.

When any trustee desires to resign his trust, he shall file his petition in the office of the clerk of superior court of the county in which he qualified or in which the instrument under which he claims is registered. The petition shall set forth all the facts in connection with the appointment and qualifications as such trustee, with a copy of the instrument under which he acts; shall state the names, ages, and residences of all the beneficiaries and other parties interested in the trust estate; shall contain a full and complete statement of all debts or liabilities due by the estate, and a full and complete statement of all assets belonging to said estate, and a full and complete statement of all moneys, securities, or assets in the hands of the trustee and due the estate, together with a full statement of the reasons the applicant should be permitted to resign his trust. The petition shall be verified by the oath of the applicant. (1911, c. 39, s. 2; C. S., s. 4024; 1977, c. 502, s. 2.)

§ 36A-25. Parties; hearing; successor appointed.

Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the trustee as plaintiff and the beneficiaries as defendants, and shall issue the summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed by the court to represent their interests in the manner now provided by law. The beneficiaries, creditors, or any other person interested in the trust estate, have the right to answer the petition and to offer evidence why the prayer of the petition should not be granted. The clerk shall then proceed to hear and determine the matter, and if it appears to the court that the best interests of the creditors and the beneficiaries demand that the resignation of the trustee be accepted, or if it appears to the court that sufficient reasons exist for allowing the resignation, and that the resignation can be allowed without prejudice to the rights of creditors or the beneficiaries, the clerk may, in the exercise of his discretion, allow the applicant to resign; and in such case the clerk shall proceed to appoint the successor of the petitioner in the manner provided in this Article. (1911, c. 39, s. 3; C. S., s. 4025; 1977, c. 502, s. 2.)

§ 36A-26. Resignation allowed; costs; judge's approval.

In making an order allowing the trustee to resign, the clerk shall make such order concerning the costs of the proceedings and commissions to the trustee as may be just. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the proceedings shall be submitted to the judge of the superior court and approved by him before the same shall become effective. (1911, c. 39, s. 3; C. S., s. 4026; 1977, c. 502, s. 2.)

§ 36A-27. Appeal; stay effected by appeal.

Any party in interest may appeal from the decision of the clerk to the judge at chambers, and in such event the procedure shall be the same as in other special proceedings as now provided by law. If the clerk allows the resignation, and an appeal is taken from his decision, such appeal shall have the effect to stay the judgment and order the clerk until the cause is heard and determined by the judge upon the appeal taken. (1911, c. 39, s. 4; C. S., s. 4027; 1977, c. 502, s. 2.)

§ 36A-28. On appeal judge determines facts.

Upon an appeal taken from the clerk to the judge, the judge shall have the power to review the findings of fact made by the clerk and to find the facts or to take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the appellate division. (1911, c. 39, s. 5; C. S., s. 4028; 1969, c. 44, s. 46; 1977, c. 502, s. 2.)

§ 36A-29. Final accounting before resignation.

No trustee shall be allowed or permitted to resign his trust until he shall first file with the court his final account of the trust estate, and until the court shall be satisfied that the said account is true and correct. (1911, c. 39, s. 6; C. S., s. 4029; 1977, c. 502, s. 2.)

§ 36A-30. Resignation effective on settlement with successor.

In case the resignation of the trustee is accepted by the court, the resignation shall not release or discharge the trustee from liability, until he shall have filed an account acceptable to his successor in full for all moneys, securities, property, or other assets or things of value in his possession or under his control or which should be in his possession or under his control belonging to the trust estate, and such account has been approved by the court. (1911, c. 39, s. 6; C. S., s. 4030; 1977, c. 502, s. 2.)

§ 36A-31. Court to appoint successor; when bond required.

If the court shall allow any trustee to resign his trust upon compliance with the provisions of this Article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such trustee; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in sum double the value of the personal property to come into his hands when bond is executed by a personal surety and in an amount not less than one and one-fourth times the value of all personal property of the decedent when the bond is secured by a suretyship bond executed by a corporate surety company authorized by the Commissioner of Insurance to do business in this State, provided that the clerk of superior court, when the value of the personal property exceeds one hundred thousand dollars ($100,000), may accept bond in an amount equal to the value of the personal property plus ten percent (10%) thereof, conditioned upon the faithful performance of his duties as such trustee and for the payment to the persons entitled to receive the same of all moneys, assets, or other things of value which may come into his hands; provided, that where by the terms of the creating instrument the trustee who has resigned was not required to give bond and did not give bond and an intent is expressed in the creating instrument that a successor trustee shall serve without bond, or where the clerk, upon due investigation finds that bond is not necessary for the protection of the estate, the clerk, with the approval of the judge, upon the petition of any party in interest, may waive the requirement of a bond for the successor trustee and permit said successor trustee to serve without bond. All bonds executed under the provisions of this Article shall be filed with the clerk. (1911, c. 39, s. 7; C. S., s. 4031; 1951, c. 264; 1965, c. 1177, s. 1; 1977, c. 502, s. 2.)

§ 36A-32. Rights and duties devolve on successor.

Upon the acceptance by the court of the resignation of any trustee, and upon the appointment by the court of his successor in the manner provided by this Article, the successor trustee shall succeed to all the rights, powers, and privileges, and shall be subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee unless a contrary intent appears from the creating instrument. (1911, c. 39, s. 8; C. S., s. 4032; 1977, c. 502, s. 2.)

§ 36A-33. Appointment of successors to deceased or incapacitated trustees.

Upon the death or incapacity of a trustee, a new trustee may be appointed on application by any beneficiary, or other interested persons, by petition to the clerk of the superior court of the county in which the instrument under which the deceased or incapacitated trustee claimed is registered, making all necessary parties defendants. The clerk shall docket the cause as a special proceeding and issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed. The beneficiaries, creditors, or any other persons interested in the trust estate shall have the right to answer the petition and to offer evidence why the prayer of the petition should not be granted. After hearing the matter, the clerk may appoint the person so named in the petition, or he may appoint some other fit and suitable person or corporation to act as the successor of the deceased or incapacitated trustee; and the clerk shall require the person so appointed to give bond as required in G.S. 36A-31; provided, that where by the terms of the instrument upon which the deceased or incapacitated trustee claimed, said trustee was not required to give bond and did not give bond and an intent is expressed in the creating instrument that a successor trustee shall serve without bond, or where the clerk upon due investigation, finds that bond is not necessary for the protection of the estate, the requirement of a bond for the successor trustee may be waived as provided in G.S. 36A-31. Any party in interest may appeal from the decision of the clerk as provided in G.S. 36A-27 and 36A-28.

Nothing in this section shall be construed to limit the authority of the clerk of superior court to appoint a successor trustee to a deceased or incapacitated trustee upon his own motion. (1953, c. 1255; 1965, c. 1177, s. 2; 1977, c. 502, s. 2.)

§ 36A-34. Testamentary trustee may renounce.

(a) Any person or corporation named as trustee in any will admitted to probate in this State, or any substitute trustee, may at any time prior to qualifying as required by G.S. 36A-107 or taking any action as trustee if such qualification is not required, and whether or not such person or corporation is entitled to so qualify or act, renounce such trusteeship by a writing filed with the clerk of superior court of the county in which the will is admitted to probate. Upon receipt of such renunciation the clerk shall give notice thereof to all persons interested in the trust, including successor or substitute trustees named in the will, which notice shall also comply with the requirements of subsection (e) of this section.

(b) If the will names or identifies a substitute trustee in case of renunciation, the provisions of the will shall be complied with, and the clerk shall enter an appropriate order appointing the substitute trustee in accordance therewith unless the substitute trustee also renounces. A substitute trustee so named shall succeed to the office of trustee upon the date of the order of appointment by the clerk unless the will provides otherwise.

(c) If the will does not name or identify a substitute trustee in case of renunciation, and it appears that a substitute trustee should be appointed, the clerk shall appoint some fit and suitable person or corporation as substitute trustee. If the will does not name or identify a substitute trustee, but contains provisions regarding the selection of a substitute trustee, such provisions shall be complied with unless the clerk determines that such provisions would result in the selection of an unfit or unsuitable trustee. A substitute trustee so appointed shall succeed to the office of trustee upon the date of the order of appointment unless the will provides otherwise.

(d) A substitute trustee shall, upon succeeding to the office of trustee, unless the will provides otherwise, have such powers and duties and be vested with the title to the property included in the trust, as if the substitute trustee had been originally named in the will.

(e) Each notice required by this section shall be written notice, and shall identify the proceeding and apprise the person to be notified of the nature of the action to be taken. Service of such notice may be in the same manner as is provided for service of notice in civil actions, or by mailing the notice to the person to be notified at his last known address. Service of notice must be completed not less than 10 days prior to the date the hearing is held or the action is taken. Service by mail shall be complete upon deposit of the notice enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department.

(f) The clerk of superior court shall file, docket, and index all proceedings pursuant to this section in the same manner as special proceedings, and shall also enter with the will a notation that the trustee has renounced and a reference to the file, or other place where the record may be found. (1967, c. 99; 1977, c. 502, s. 2.)

§ 36A-35. Removal of trustee.

Any beneficiary, cotrustee or other person interested in the trust estate may file a petition in the office of the clerk of superior court of the county having jurisdiction over the administration of the trust for the removal of a trustee or cotrustee who fails to comply with the requirements of this Chapter or a court order, or who is otherwise unsuitable to continue in office. Upon the filing of the petition, the clerk shall docket the cause as a special proceeding, with the petitioner as plaintiff. All known beneficiaries, trustees, or cotrustees not joined as plaintiffs shall be joined as defendants. Upon proper notice and hearing, the clerk may, in the exercise of his discretion, order the removal of the trustee or cotrustee and proceed to appoint a successor. The procedure for notice, hearing, appeals, and the effective date of the order, shall be in accord with that provided for in the case of a resignation of a trustee and the appointment of a successor in G.S. 36A-24 through 36A-32.

Nothing in this section shall be construed to limit the authority of the clerk of superior court to remove a trustee or cotrustee for failure to comply with the requirements of this Chapter or a court order, or who is otherwise unsuitable to continue in office. (1977, c. 502, s. 2.)

§ 36A-36. Appointment of special trustee.

If it appears necessary to the protection of the trust estate, the clerk of superior court having jurisdiction of the administration of the trust may appoint a special trustee until a successor trustee can be appointed or, where a trust has terminated, to distribute the assets. A special trustee may be appointed without notice and may be removed whenever the court so orders. The special trustee shall give such bond, if any, as the court may require and shall have the powers conferred by the order of appointment. (1977, c. 502, s. 2.)

§ 36A-37. Consolidation, merger, reorganization, reincorporation, or transfer of assets and liabilities by a corporate trustee.

Whenever any corporate trustee doing business in this State shall consolidate or merge with or shall sell to and transfer its assets and liabilities to any other corporation, or where such corporate trustee is in any manner reorganized or reincorporated all existing rights, powers, duties, and liabilities of such consolidating, merging, transferring, reorganizing or reincorporating corporation as trustee shall, upon the effective date of such consolidation, merger, reorganization or reincorporation, or sale and transfer, vest in and devolve upon the transferee corporation or the consolidated, merged, reorganized or reincorporated corporation in the manner prescribed in G.S. 53-17. (1977, c. 502, s. 2.)

§ 36A-38. Powers of successor trustee.

Unless otherwise provided in the creating instrument, all powers conferred upon the trustee by such instrument attached to the office, as provided in G.S. 36A-72, and are exercisable by the trustee from time to time holding the office. (1977, c. 502, s. 2.)

§ 36A-39. Powers of cotrustees.

Unless otherwise provided in the creating instrument, if one of several trustees dies, resigns, or is removed, the remaining trustees shall have all rights, title, and powers of all the original trustees. If the creating instrument manifests an intent that a successor trustee be appointed to fill a vacancy, the remaining trustees may exercise the powers of all the original trustees until such time as a successor is appointed. (1977, c. 502, s. 2.)

§ 36A-40. Vesting of title.

A special or successor trustee is vested with the title of the original trustee. A trustee who resigns, is removed, or is otherwise severed from his office shall execute such documents transferring title to trust property as may be appropriate to facilitate administration of the trust and upon his failure to do so, the clerk may order him to execute such documents, or may himself transfer title. (1977, c. 502, s. 2.)

§ 36A-41. Applicability.

The provisions of this Article shall not apply to proceedings begun before January 1, 1978. (1977, c. 502, s. 2.)

§§ 36A-42 to 36A-46: Reserved for future codification purposes.

ARTICLE 4.

Charitable Trusts.

§ 36A-47. Trustees to file accounts; exceptions.

When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to file in writing annually a full and particular account thereof with the clerk of the superior court of the county where the charity is to take effect.

This section shall not apply to real or personal property granted by deed, will or otherwise in trust or any other manner for the use and benefit of churches, hospitals, educational institutions and organizations or other incorporated or unincorporated religious and charitable institutions; provided, however, all trusts for the benefit of churches, hospitals and charitable institutions may be required to file such account upon the request of the clerk of the superior court or the verified written request of an interested citizen when in the opinion of the clerk of the superior court such request is bona fide and the interest of the public would be promoted by the filing of such report. (43 Eliz., c. 4; 1832, c. 14, s. 1; R. C., c. 18, s. 1; Code, s. 2342; Rev., s. 3922; C. S., s. 4033; 1951, c. 1008, s. 1; 1977, c. 502, s. 2.)

§ 36A-48. Action for account; court to enforce trust.

If G.S. 36A-47 be not complied with, or there is reason to believe that the property has been mismanaged through negligence or fraud, it shall be the duty of the clerk of the superior court in his discretion to give notice thereof to the Attorney General or district attorney who represents the State in the superior court for that county; and it shall be the duty of the Attorney General or such district attorney upon notice from the clerk or upon his own motion to bring an action in the name of the State against the grantees, executors, or trustees of the charitable fund, calling on them to render a full and minute account of their proceedings in relation to the administration of the fund and the execution of the trust. The Attorney General or district attorney may also, at the suggestion of two reputable citizens, commence an action as aforesaid, and, in either case, the court may make such order and decree as shall seem best calculated to enforce the performance of the trust.

In furtherance of his responsibilities in the area of charitable trusts the Attorney General may request the result or report of any investigation or audit conducted by any local, State or federal agency. (1832, c. 14, ss. 2, 3; R. C., c. 18, ss. 2, 3; Code, ss. 2343, 2344; Rev., s. 3923; C. S., s. 4034; 1973, c. 47, s. 2; 1977, c. 502, s. 2.)

Legal Periodicals. — For article entitled, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

CASE NOTES

Negligence or Fraud in Mismanagement of Trust. — In the absence of a showing of special interest, a party seeking enforcement of a charitable trust should have the Attorney General or district attorney commence an action pursuant to the provisions of this section when it appears that the trust is being mismanaged through negligence or fraud. Kania v. Chatham, 297 N.C. 290, 254 S.E.2d 528 (1979).

§ 36A-49. Not void for indefiniteness; title in trustee; vacancies.

No gift, grant, bequest or devise, whether in trust or otherwise, to religious, educational, charitable or benevolent uses or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, shall be invalid by reason of any indefiniteness or uncertainty of the objects or beneficiaries of such trust, or because said instrument confers upon the trustee or trustees discretionary powers in the selection and designation of the objects or beneficiaries of such trust or in carrying out the purpose thereof, or by reason of the same in contravening any statute or rule against perpetuities. If a trustee or trustees are named in the instrument creating such a gift, grant, bequest or devise, the legal title to the property given, granted, bequeathed or devised for such purpose shall vest in such trustee or trustees and its or their successor or successors duly appointed in accordance with the terms of such instrument. If no trustee or trustees be named in said instrument, or if a vacancy or vacancies shall occur in the trusteeship, and no method is provided in such instrument for filling such vacancy or vacancies, then the clerk of superior court of the proper county shall appoint a trustee or trustees, pursuant to G.S. 36A-23, to execute said trust in accordance with the true intent and meaning of the instrument creating the same. Such trustee or trustees when so appointed shall be vested with all the power and authority, discretionary or otherwise, conferred by such instrument. (1925, c. 264, s. 1; 1977, c. 502, s. 2.)

§ 36A-50. Trusts created in other states valid.

Every such religious, educational or charitable trust created by any person domiciled in another state, which shall be valid under the laws of the state of the domicile of such creator or donor, shall be deemed and held in all respects valid under the laws of this State, even though one or more of the trustees named in the instrument creating said trust shall be domiciled in another state or one or more of the beneficiaries named in said trust shall reside or be located in a foreign state. (1925, c. 264, s. 2; 1977, c. 502, s. 2.)

§ 36A-51. Application of § 36A-50.

G.S. 36A-50 shall apply to all trusts heretofore or hereafter created in which one or more of the beneficiaries or objects of such trust shall reside or be located in this State. (1925, c. 264, s. 3; 1977, c. 502, s. 2.)

§ 36A-52. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.

(a) Declaration of Policy. — It is hereby declared to be the policy of the State of North Carolina that gifts, transfers, grants, bequests, and devises for religious, educational, charitable, or benevolent uses or purposes, or for some or all of such uses or purposes, are and shall be valid, notwithstanding the fact that any such gift, transfer, grant, bequest, or devise shall be in general terms, and this section shall be construed liberally to affect the policy herein declared.

(b) No Gift, Transfer, Etc., Invalid for Indefiniteness. — No gift, transfer, grant, bequest, or devise of property or income or both, in trust or otherwise, for religious, educational, charitable, or benevolent purposes, or for some or all of such purposes, is or shall be void or invalid because such gift, transfer, grant, bequest, or devise is in general terms, or is uncertain as to the specific purposes, objects, or beneficiaries thereof, or because the trustee, donee, transferee, grantee, legatee, or devisee, or some or all of them, is given no specific instructions, powers, or duties as to the manner or means of affecting such purposes. When any such gift, transfer, grant, bequest, or devise has been or shall be made in general terms the trustee, donee, transferee, grantee, legatee, or devisee, or other person, corporation, association, or entity charged with carrying such purposes into effect, shall have the right and power: To prescribe or to select from time to time one or more specific objects or purposes for which any trust or any property or income shall be held and administered; to select or to create the machinery for the accomplishment of such objects and purposes, selected as hereinabove provided, or as provided by the donor, transferor, grantor, or testator, including, by way of illustration but not of limitation, the accomplishment of such objects and purposes by the acts of such trustee or trustees, donee, transferee, grantee, legatee, or devisee, or their agents or servants, or by the creation of corporations or associations or other legal entities for such purpose, or by making grants to corporations, associations, or other organizations then existing, or to be organized, through and by which such purposes can or may be accomplished, or by some or all of the said means of accomplishment, or any other means of accomplishment not prohibited by law.

(c) Enforcement. — Any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes which is or shall be valid under the provisions of this section may be enforced in a suit for a writ of mandamus by the Attorney General of the State of North Carolina in any court of the State having original jurisdiction in equity, and such court shall have the power to enter judgment requiring the trustee, donee, transferee, grantee, legatee, or devisee, as the case may be, to make such selection as may be required of the purposes for which the property or income, or both, shall be applied, and the means, method, and manner of applying the same. The remedy for enforcement as herein provided is in addition to any other means of enforcement now in existence or which may be hereafter provided for by act of the General Assembly.

(d) Construction with Other Acts. — This section is in addition to any prior act or acts of the General Assembly adopted for the purpose of preserving and sustaining any gift, transfer, grant, bequest, or devise for religious, educational, charitable, or benevolent uses or purposes, and any such prior act or acts or any part thereof which will aid the provisions of this section in sustaining and preserving any such gift, transfer, grant, bequest, or devise shall be read and construed in conjunction herewith. (1947, c. 630, ss. 1-4; 1977, c. 502, s. 2.)

§ 36A-53. Charitable Trusts Administration Act.

(a) If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. In every such proceeding, the Attorney General, as representative of the public interest, shall be notified and given an opportunity to be heard. This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust or devise or bequest for charity and such trust, devise or bequest for charity fails, the intention shown in the original plan shall prevail in the application of this section.

(b) In the case of a will executed before December 31, 1978, or a trust created before such date, if a federal estate tax deduction is not allowable at the time of a decedent's death because of the failure of an interest in property which passes from the decedent to a person, or for a use, described in section 2055(a) of the Internal Revenue Code of 1954, to meet the requirements of subsections 2055(e)(2)(A) or (B) of the Internal Revenue Code of 1954, then in order that such deduction shall nevertheless be allowable under section 2055(e)(3) of the Internal Revenue Code of 1954, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party and either (i) with the written consent of the charitable beneficiaries, the noncharitable beneficiaries not under any legal disability, and duly appointed guardians or guardians ad litem acting on behalf of any beneficiaries under legal disability, or (ii) upon a finding that the interest of such beneficiaries is substantially preserved, order an amendment to the trust so that the remainder interest is in a trust which is a charitable remainder annuity trust, a charitable remainder unitrust (as those terms are described in section 664 of the Internal Revenue Code of 1954) or a pooled income fund (as that term is described in section 642(c)(5) of the Internal Revenue Code of 1954), or so that any other interest of a charitable beneficiary is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly), in accordance with the provisions of section

2055(e)(2)(B) of the Internal Revenue Code of 1954. In every such proceeding, the Attorney General, as representative of the public interest, shall be notified, and given an opportunity to be heard.

(c) The words "charity" and "charitable," as used in this section shall include, but shall not be limited to, any eleemosynary, religious, benevolent, educational, scientific, or literary purpose.

(d) The words "impracticable of fulfillment," as used in this section shall include, but shall not be limited to, the failure of any trust for charity, testamentary or inter vivos, (including, without limitation, trusts described in section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws and charitable remainder trusts described in section 664 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws) to include, if required to do so by section 508(e) or section 4947(a) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws, the provisions relating to governing instruments set forth in section 508(e) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws. (1967, c. 119; 1971, c. 1136, s. 2; 1975, c. 552; 1977, c. 502, s. 2; 1979, c. 772; 1981, c. 546.)

Effect of Amendments. — The 1979 amendment, in the first sentence of subsection (b), substituted "subsections 2055(e)(2)(A) or (B)" for "subsection 2055(e)(2)(A)" following "requirements of," substituted "beneficiaries, the noncharitable beneficiaries" for "remaindermen, the beneficiaries of the intervening interest" preceding "not under any," and, at the end of the sentence added the language beginning "or so that . . . ."

The 1981 amendment substituted "December 31, 1978" for "December 31, 1977" near the beginning of the first sentence of subsection (b).

§ 36A-54. Charitable trusts tax exempt status.

(a) Notwithstanding any provisions in the laws of this State or in the governing instrument to the contrary unless otherwise decreed by a court of competent jurisdiction except as provided in subsection (b), the governing instrument of each trust which is a private foundation described in section 509 of the Internal Revenue Code of 1954 (including each nonexempt charitable trust described in section 4947(a)(1) of the Code which is treated as a private foundation) and the governing instrument of each nonexempt split-interest trust described in section 4947(a)(2) of the Code (but only to the extent that section 508(e) of the Code is applicable to such nonexempt split-interest trust under section 4947(a)(2) of the Code) shall be deemed to contain the following provisions: "The trust shall make distributions at such time and in such manner as not to subject it to tax under section 4942 of the Code; the trust shall not engage in any act of self-dealing which would subject it to tax under section 4941 of the Code; the trust shall not retain any excess business holdings which would subject it to tax under section 4943 of the Code; the trust shall not make any investments which would subject it to tax under section 4944 of the Code; and the trust shall not make any taxable expenditures which would subject it to tax under section 4945 of the Code." With respect to any such trust created prior to January 1, 1970, this subsection (a) shall apply only for its taxable years beginning on or after January 1, 1972.

(b) The trustee of any trust described in subsection (a) may, (i) without judicial proceedings, amend such trust to expressly exclude the application of subsection (a) by executing a written amendment to the trust and filing a duplicate original of such amendment with the Attorney General of the State of North Carolina, and upon filing of such amendment, subsection (a) shall not apply to such trust, or (ii) institute an action in the superior court of North Carolina seeking reformation of the trust instrument pursuant to the authority set forth in G.S. 36A-53.

(c) All references in this section to the "code" are to the Internal Revenue Code of 1954, and all references in this section to specific sections of the Code include corresponding provisions of any subsequent federal tax laws. (1971, c. 1136, s. 4; 1977, c. 502, s. 2.)

§§ 36A-55 to 36A-59: Reserved for future codification purposes.

ARTICLE 5.

Uniform Trusts Act.

§ 36A-60. Definitions.

As used in this Article unless the context or subject matter otherwise requires:

(1) "Affiliate" means any person directly or indirectly controlling or controlled by another person, as herein defined, or any person under direct or indirect common control with another person. It includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange.

(2) "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, an unincorporated organization, or two or more persons having a joint or common interest.

(3) "Relative" means a spouse, ancestor, descendant, brother or sister.

(4) "Trust" means an express trust only.

(5) "Trustee" includes trustees, a corporate as well as a natural person and a successor or substitute trustee. (1939, c. 197, s. 1; 1977, c. 502, s. 2.)

§ 36A-61. Bank account to pay special debts.

(a) Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the creditors to be paid therefrom, subject to such power or revocation as the depositor may have reserved by agreement with the bank.

(b) If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor. (1939, c. 197, s. 2; 1977, c. 502, s. 2.)

§ 36A-62. Loan of trust funds.

Except as hereinafter provided in this Article, no corporate trustee shall lend trust funds to itself or an affiliate, or other business associate, or to any director, officer, or employee of itself or of an affiliate, nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner, affiliate, or other business associate. (1939, c. 197, s. 3; 1977, c. 502, s. 2.)

§ 36A-63. Funds held by a bank awaiting investment or distribution.

(a) Funds held in a fiduciary capacity by a bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

(b) Funds held in trust by a bank, awaiting investment or distribution may, unless prohibited by the instrument creating the trust, be deposited in the commercial or savings or other department of the bank, provided that it shall first set aside under control of the trust department as collateral security, such securities as may be found listed in G.S. 142-34 as being eligible for the investment of the sinking funds of the State of North Carolina equal in market value of such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five percent (125%) of the funds so deposited.

The securities so deposited or securities substituted therefor as collateral in the trust department by the commercial or savings or other department (as well as the deposit of cash in the commercial or savings or other department by the trust department) shall be held pursuant to the provisions of G.S. 53-43(6).

If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation. (1939, c. 197, s. 4; 1963, c. 243, ss. 1, 2; 1977, c. 502, s. 2.)

§ 36A-64. Loan to trust.

A trustee may make a loan to a trust account and may take as security therefor assets of the trust account provided that such transaction is fair. (1977, c. 502, s. 2.)

§ 36A-65. Trustee loaning from one trust to another trust.

A trustee may make a loan to a trust account from the funds belonging to another trust account, when the instrument creating the account from which the loan is made (i) authorizes the making of such loan and (ii) designates the trust account to which the loan is made, provided that the transaction is fair to both accounts. (1977, c. 502, s. 2.)

§ 36A-66. Trustee buying from or selling to self.

No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate, or from or to a relative, employer, partner, or other business associate. (1939, c. 197, s. 5; 1977, c. 502, s. 2.)

§ 36A-67. Corporate trustee buying its own stock.

No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stocks, bonds or other securities of an affiliate. (1939, c. 197, s. 7; 1977, c. 502, s. 2.)

§ 36A-68. Trustee selling assets from one trust to another trust.

A trustee may sell assets held by it as fiduciary in one trust account to itself as trustee in another trust account if the transaction is fair to both accounts and if the transaction is expressly authorized by the instrument or instruments creating the accounts. (1939, c. 197, s. 6; 1945, c. 127, s. 3; c. 743, s. 3; 1977, c. 502, s. 2.)

§ 36A-69. Voting stock.

A trustee owning shares of corporate stock or other securities may vote it in person or by general or limited proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock, in voting it or in not voting it. (1939, c. 197, s. 8; 1977, c. 502, s. 2.)

§ 36A-70. Trustees holding stock or other securities in name of nominee.

A trustee may hold shares of stock or other securities in the name of a nominee, without mention of the trust relationship in the instrument representing stock or other securities or in registration records of the issuer thereof; provided, that

(1) The records and all reports or accounts rendered by the trustee clearly show the ownership of the stock or other securities by the trustee and the facts regarding its holdings, and

(2) The nominee shall not have possession of the stock or other securities or access thereto except under the immediate supervision of the trustee or when such securities are deposited by the fiduciary in a clearing corporation as defined in G.S. 25-8-102(3).

The trustee shall be personally liable for any acts or omissions of such nominee in connection with such stock or other securities so held, as if such had done such acts or been guilty of such omissions. (1939, c. 197, s. 9; 1945, c. 292; 1973, c. 144; c. 497, s. 1; 1975, c. 121; 1977, c. 502, s. 2.)

§ 36A-71. Bank and trust company assets kept separate, records of securities.

Every trust company shall keep its trust assets separate and distinct from assets owned by the bank. The books and accounts of the trust company shall at all times show the ownership of all moneys, funds, investments, and property held by the company. Stock or other securities may be kept by the company in either of the following ways:

(1) All certificates representing the securities of an account may be held separate from those of all other accounts; or

(2) Certificates representing the securities of the same class of the same issuer held for particular accounts may be held in bulk without certification as to ownership attached and, to the extent feasible, certificates of small denomination may be merged into one or more certificates of larger denomination, provided that the trust company, when operating under the method of safekeeping security certificates described in this subdivision shall be subject to such rules and regulations as, in the case of State-chartered institutions, the State Banking Commission and, in the case of national banking associations, the Comptroller of the Currency, may from time to time issue and, upon demand by any person to whom it has a duty to account, it

shall certify in writing the securities held by it for an account. (1973, c. 497, s. 2; 1977, c. 502, s. 2.)

§ 36A-72. Powers attached to office.

Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal. (1939, c. 197, s. 10; 1977, c. 502, s. 2.)

§ 36A-73. Powers exercisable by one or more trustees.

(a) If there are more than two trustees and the trust instrument expressly makes provision for the execution of any of the powers of trustees by all of them or by any one or more of them, the provisions of the trust instrument govern.

(b) If there is no governing provision in the trust instrument, cotrustees may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county which is the principal place of administration of the trust, provide that any one or more of the following powers of trustees may be exercised by any designated one or more of them:

(1) Open bank accounts and draw checks thereon;
(2) Subject to the provisions of G.S. 105-24, enter any safe-deposit box of the deceased or any safe-deposit box rented by the trust;
(3) Employ attorneys and accountants;
(4) List property for taxes and prepare and file State, municipal and county tax returns;
(5) Collect claims and debts due the trust and give receipts therefor;
(6) Pay claims against and debts of the trust;
(7) Compromise claims in favor of or against the trust;
(8) Have custody of property of the trust.

For the purposes of this subsection, when there are cotrustees, the principal place of administration of the trust is (i) the usual place of business of the corporate trustee if there is but one corporate cotrustee, or (ii) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate trustee, and (iii) the usual place of business or residence of any of the cotrustees as agreed upon by them.

(c) The voting of corporate shares of stock by cotrustees is governed by G.S. 55-69(f).

(d) Subject to the provisions of subsections (a), (b) and (c) of this section, all other acts and duties must be performed by both of the trustees if there are two, or by a majority of them if there are more than two.

No trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of his cotrustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of such joinder.

(e) No trustee shall be relieved of liability on his bond or otherwise by entering into any agreement under this section. (1939, c. 197, s. 11; 1977, c. 502, s. 2.)

§ 36A-74. Contracts of trustee.

(a) Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued may sue the trustee in his representative capacity, and any judgment rendered, in such action in favor of the plaintiff shall be collectible (by execution) out of the trust property. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

(b) No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within 30 days after the beginning of such action, or within such other time as the court may fix, and more than 30 days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the Attorney General and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within 10 days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the Attorney General and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

(c) The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability. (1939, c. 197, s. 12; 1977, c. 502, s. 2.)

Legal Periodicals. — For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

§ 36A-75. Exoneration or reimbursement for torts.

(a) A trustee who has incurred personal liability for a tort committed in the administration of the trust is entitled to exoneration therefor from the trust property if he has not discharged the claim, or to be reimbursed therefor out of trust funds if he has paid the claim, if

(1) The tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust, or,

(2) Although the tort was not a common incident of such activity if neither the trustee nor any officer or employee of the trustee was guilty of personal fault in incurring the liability.

(b) If a trustee commits a tort which increases the value of the trust property, he shall be entitled to exoneration or reimbursement with respect thereto to the extent of such increase in value, even though he would not otherwise be entitled to exoneration or reimbursement.

(c) Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 13; 1977, c. 502, s. 2.)

§ 36A-76. Tort liability of trust estate.

(a) Where a trustee or his predecessor has incurred personal liability for a tort committed in the course of his administration, the trustee in his representative capacity may be sued and collection had from the trust property, if the court shall determine in such action that

(1) The tort was a common incident of the kind of business activity in which the trustee or his predecessor was properly engaged for the trust; or

(2) That, although the tort was not a common incident of such activity, neither the trustee nor his predecessor, nor any officer or employee of the trustee or his predecessor, was guilty of personal fault in incurring the liability; or

(3) That, although the tort did not fall within subdivision (1) or (2) above, it increased the value of the trust property.

If the tort is within subdivision (1) or (2) above, collection may be had of the full amount of damage proved; and if the tort is within subdivision (3) above, collection may be had only to the extent of the increase in the value of the trust property.

(b) In an action against the trustee in his representative capacity under this section the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

(c) No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within 30 days after the beginning of the action, or within such other period as the court may fix and more than 30 days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustees who then had a present interest of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to such beneficiaries at their last known addresses. The trustees shall furnish the plaintiff a list of such beneficiaries and their addresses, within 10 days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary may intervene in such action and contest the right of the plaintiff to recover.

(d) The trustee may also be held personally liable for any tort committed by him, or by his agents or employees in the course of their employments, subject to the rights of exoneration or reimbursement provided in G.S. 36A-75.

(e) Nothing in this section shall be construed to change the existing law with regard to the liability of trustees of charitable trusts for torts of themselves or their employees. (1939, c. 197, s. 14; 1977, c. 502, s. 2.)

§ 36A-77. Withdrawals from mingled trust funds.

Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such a withdrawal shall be charged first to the amount of cash, credit, or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit, or other property, then to the several trusts in proportion to their several interests in the cash, credit, or other property at the time of the withdrawal. (1939, c. 197, s. 15; 1977, c. 502, s. 2.)

§ 36A-78. Power of settlor.

The settlor of any trust affected by this Article may, by provision in the instrument creating the trust if the trust was created by a writing, or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally, or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve liabilities which would otherwise be imposed upon him by this Article; or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by this Article; or add duties, restrictions, liabilities, privileges, or powers, to those imposed or granted by this Article; but no act of the settlor shall relieve a trustee from the duties, restrictions, and liabilities imposed upon him by G.S. 36A-62, 36A-63 and G.S. 36A-66. (1939, c. 197, s. 17; 1977, c. 502, s. 2.)

§ 36A-79. Power of beneficiary.

Any beneficiary of a trust affected by this Article may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to such beneficiary from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee by this Article, except as to the duties, restrictions, and liabilities imposed by G.S. 36A-62, 36A-63 and G.S. 36A-66. Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this Article. (1939, c. 197, s. 18; 1977, c. 502, s. 2.)

§ 36A-80. Power of the court.

A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this Article, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this Article. (1939, c. 197, s. 19; 1977, c. 502, s. 2.)

§ 36A-81. Liabilities for violations of Article.

If a trustee violated any of the provisions of this Article, he may be removed and denied compensation in whole or in part; and any beneficiary, cotrustee, or successor trustee may treat the violation as a breach of trust. (1939, c. 197, s. 20; 1977, c. 502, s. 2.)

§ 36A-82. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law to those states which enact it. (1939, c. 197, s. 21; 1977, c. 502, s. 2.)

§ 36A-83. Short title.

This Article may be cited as the Uniform Trusts Act. (1939, c. 197, s. 22; 1977, c. 502, s. 2.)

§ 36A-84. Time of taking effect.

This Article shall take effect and shall apply in the construction of and operation under

(1) All agreements containing trust provisions entered into on or after January 1, 1978;
(2) All wills made by testators who shall die on or after January 1, 1978, and
(3) All other wills and trust agreements and trust relations insofar as such terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of North Carolina or of the United States of America. (1939, c. 197, s. 25; 1941, c. 269; 1977, c. 502, s. 2.)

§§ 36A-85 to 36A-89: Reserved for future codification purposes.

ARTICLE 6.

Uniform Common Trust Fund Act.

§ 36A-90. Establishment of common trust funds.

(a) Any bank or trust company duly authorized to act as a fiduciary in this State may establish and maintain one or more common trust funds for the collective investment of funds held in a fiduciary capacity by such bank or trust company hereafter referred to as the "maintaining bank". The maintaining bank may include for the purposes of collective investment in such common trust fund or funds established and maintained by it, funds held in a fiduciary capacity by any other bank or trust company duly authorized to act as a fiduciary, wherever located, which other bank or trust company is hereinafter referred to as the "participating bank".

Provided, however, that the relationship between the maintaining bank and the participating bank is (i) the maintaining bank owns, controls or is affiliated with the participating bank or (ii) a bank holding company owns, controls or is affiliated with both the maintaining bank and the participating bank.

(b) For the purposes of this section, a bank or trust company shall be considered to be owned, controlled or affiliated if twenty-five percent (25%) or more of any class of its voting stock is owned by a bank or bank holding company or if twenty-five percent (25%) or more of any class of its voting stock is owned by one person or no more than 10 persons who are the same person or persons who own twenty-five percent (25%) or more of any class of the voting stock of the maintaining bank.

(c) Such common trust funds may include a fund composed solely of funds held under an agency agreement in which the bank or trust company assumes investment discretion and assumes fiduciary responsibility.

(d) Such bank or trust company may invest the funds held by it in any fiduciary capacity in one or more common trust funds, provided (i) such investment is not prohibited by the instrument, judgment, decree or order creating such fiduciary relationship or amendment thereof; (ii) in the case of co-fiduciaries the written consent of the co-fiduciary is obtained by the bank or trust company; and (iii) that the bank has no interest in the assets of the common trust fund other than as a fiduciary. (1939, c. 200, s. 1; 1973, c. 1276; 1977, c. 502, s. 2.)

§ 36A-91. Court accountings.

Unless ordered by a court of competent jurisdiction the bank or trust company operating such common trust fund or funds shall not be required to render a court accounting with regard to such fund or funds; but it may, by application to the superior court, secure approval of such an accounting on such conditions as the court may establish. This section shall not affect the duties of the trustees of the participating trusts under the common trust fund to render accounts of their several trusts. (1939, c. 200, s. 2; 1977, c. 502, s. 2.)

§ 36A-92. Supervision by State Banking Commission.

All common trust funds established under the provisions of this Article shall be subject to the rules and regulations of the State Banking Commission. (1939, c. 200, s. 3; 1977, c. 502, s. 2.)

§ 36A-93. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1939, c. 200, s. 4; 1977, c. 502, s. 2.)

§ 36A-94. Short title.

This Article may be cited as the Uniform Common Trust Fund Act. (1939, c. 200, s. 5; 1977, c. 502, s. 2.)

§§ 36A-95 to 36A-99: Reserved for future codification purposes.

ARTICLE 7.

Trusts of Death Benefits.

§ 36A-100. Interest of trustee as beneficiary of life insurance or other death benefit sufficient to support inter vivos or testamentary trust.

(a) The interest of a trustee as the beneficiary of a life insurance policy is a sufficient property interest or res to support the creation of an inter vivos or testamentary trust notwithstanding the fact that the insured or any other person or persons reserves or has the right to exercise any one or more of the following rights or powers:

(1) To change the beneficiary,
(2) To surrender the policy and receive the cash surrender value,
(3) To borrow from the insurance company issuing the said policy or elsewhere using the said policy as collateral security,
(4) To assign the said policy, or
(5) To exercise any other right in connection with the said policy commonly known as an incident of ownership thereof.

The term "life insurance policy" includes but is not limited to life, annuity, and endowment contracts, or any variation or combination thereof, and any agreement entered into by an insurance company in connection therewith.

(b) The interest of a trustee as the beneficiary of a death benefit under an employee benefit plan or group life insurance policy is a sufficient property interest or res to support the creation of an inter vivos or testamentary trust notwithstanding the fact that the insured, employer, insurer or administrator of the plan reserves or has the right to revoke or otherwise defeat the designation or assignment or to exercise any one or more of the rights or powers incident to employee benefit plans or group life insurance policies.

The term "employee benefit plan" includes but is not limited to pension, retirement, death benefit, deferred compensation, employment, agency, retirement annuity, stock bonus, profit-sharing or employees' savings contracts, plans, systems or trusts; and trusts, securities or accounts established or held pursuant to the federal Self-Employed Individuals Tax Retirement Act of 1962, the federal Employee Retirement Income Security Act of 1974, or similar legislation. The term "group life insurance policy" includes but is not limited to group life, industrial life, accident, and health insurance policies having death benefits.

(c) A person having the right to designate the beneficiary under a life insurance policy, employee benefit plan or group life insurance policy described in subsection (a) or (b) of this section may designate as such beneficiary a trustee named or to be named in his will whether or not the will is in existence at the time of the designation. The proceeds received by the trustee shall be held and disposed of as part of the trust estate under the terms of the will as they exist at the death of the testator. If no qualified trustee makes claim to the proceeds within six months after the death of the decedent or if within that period it is established that no trustee can qualify to receive the proceeds, payments shall be made to the personal representative of the estate of the person making the designation unless it is otherwise provided by an alternative designation or by the policy or plan. The proceeds received by the trustee shall not be subject to claims against the estate of the decedent or to inheritance taxes to any greater extent than if the proceeds were payable directly to the beneficiary or beneficiaries named in the trust. The proceeds may be commingled with any other assets which may properly become part of such trust, but the proceeds shall not become part of the decedent's estate for purposes of trust administration unless the will of the decedent expressly so provides.

(d) Pursuant to the preceding subsection (c) of this section, a decedent may designate a trustee named or to be named in his will as beneficiary of an annuity or other payment described in section 2039(c) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws. The decedent's will may prohibit the use of such an annuity or other payment for the benefit of the decedent's estate. (1957, c. 1444, s. 1; 1977, c. 502, s. 2.)

Legal Periodicals. — For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

§ 36A-101. Applicability and construction of Article.

G.S. 36A-100 applies to any beneficiary designation made before or after January 1, 1978, by a person who dies on or after that date. It does not create any implication of invalidity or ineffectiveness as to any beneficiary designation made by a person who dies before January 1, 1978. If any part of the Article is held invalid, such invalidity shall not affect the validity of the remaining provisions of this Article. (1957, c. 1444, s. 2; 1977, c. 502, s. 2.)

§§ 36A-102 to 36A-106: Reserved for future codification purposes.

ARTICLE 8.

Testamentary Trustees.

§ 36A-107. Trustees in wills to qualify and file inventories and accounts.

Trustees appointed in any will admitted to probate in this State, into whose hands assets come under the provisions of the will, shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets which come into his hands and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to auditing and approving shall be the same as in such cases. This section shall not apply to the extent that any will makes a different provision in regard to the requirements for filing inventories and accounts. (1907, c. 804; C.S., s. 51; 1961, c. 519; 1965, c. 1176, s. 1; 1973, c. 1329, s. 4; 1977, c. 502, s. 2.)

§§ 36A-108 to 36A-114: Reserved for future codification purposes.

ARTICLE 9.

Alienability of Beneficial Interest; Spendthrift Trust.

§ 36A-115. Alienability of beneficiary's interest; spendthrift trusts.

(a) Except as provided in subsection (b) hereof, all estates or interests of trust beneficiaries are alienable either voluntarily or involuntarily to the same extent as are legal estates or interests of a similar nature.

(b) Subsection (a) hereof shall not apply to a beneficiary's estate or interest in any one or any combination of one or more of the trusts described below, in which the beneficiary's estate or interest shall not be alienable either voluntarily or involuntarily.

(1) Discretionary Trust. — A trust wherein the amount to be received by the beneficiary, including whether or not the beneficiary is to receive anything at all, is within the discretion of the trustee.

(2) Support Trust. — A trust wherein the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or to apply on behalf of the beneficiary such sums as the trustee shall, in his discretion, determine are appropriate for the support, education or maintenance of the beneficiary.

(3) Protective Trust. — A trust wherein the creating instrument provides that the interest of the beneficiary shall cease if

a. The beneficiary alienates or attempts to alienate that interest; or

b. Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or

c. The beneficiary becomes insolvent or bankrupt. (1979, c. 180, s. 1.)

Editor's Note. — Session Laws 1979, c. 180, s. 3, provides: "This act shall become effective on October 1, 1979 and shall apply to trusts created on or after the effective date."

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

Chapter 38.

Boundaries.

§ 38-1. Special proceeding to establish.

CASE NOTES

Statute Is Not Jurisdictional. — Boundary disputes are usually tried by special proceedings brought before the clerk of superior court under this chapter. This statute is not jurisdictional, however, and by consent a boundary dispute may be originally tried before a superior court judge. Wadsworth v. Georgia-Pacific Corp., 38 N.C. App. 1, 247 S.E.2d 25 (1978), vacated on other grounds, 297 N.C. 172, 253 S.E.2d 925 (1979).

Purpose of Processioning. — The primary purpose of a processioning proceeding is to establish the correct location of the disputed dividing line. Such a proceeding may not be dismissed by a directed verdict. A plaintiff instituting a true processioning proceeding has the legal right to have the line ascertained and fixed by judicial decree regardless of the sufficiency of his evidence to establish the line as contended for by him. Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978).

Right to Have Issue Answered by Jury. —

A directed verdict is never proper when the question is for the jury, and in processioning proceedings the determination of the boundary is for the jury. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

In processioning proceedings it is the duty of the jury to locate the boundary. If petitioners fail to carry their burden of proof, the jury need not fix the line according to the respondents' contentions, but may locate the boundary wherever they feel the evidence justifies. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

§ 38-3. Procedure.

CASE NOTES

True Location of Disputed Line Must Be Alleged. —

In accord with 2nd paragraph in original. See Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

Effect of Defendant's Denial of Petitioners' Claims. — The third sentence of this section refers to defendant's failure to file an answer and did not apply where the respondents denied the petitioners' claims and alleged what they considered to be the correct boundary line. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

Right to Have Issue Answered by Jury. — In processioning proceedings it is the duty of the jury to locate the boundary. If petitioners fail to carry their burden of proof, the jury need not fix the line according to the respondents' contentions, but may locate the boundary wherever they feel the evidence justifies. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

Burden of Proof. —

Where a case was tried by stipulation on the defendant's counterclaim as to the location of the boundary line, the burden of proof was on the defendant to establish the boundary line. Wadsworth v. Georgia-Pacific Corp., 38 N.C. App. 1, 247 S.E.2d 25 (1978), vacated on other grounds, 297 N.C. 172, 253 S.E.2d 925 (1979).

Acts and Admissions of Adjoining Proprietors as Evidence. — When a dividing line between two tracts can be located by the calls in a deed, the statements and acts of adjoining landowners are not competent evidence as to the location of the boundary line, but where the line is in dispute and is unfixed and uncertain, the acts and admissions of the adjoining proprietors recognizing a certain line as the proper boundary line are evidence competent to be submitted to the trier of the facts. Wadsworth v. Georgia-Pacific Corp., 38 N.C. App. 1, 247 S.E.2d 25 (1978), vacated on other grounds, 297 N.C. 172, 253 S.E.2d 925 (1979).

Chapter 39.

Conveyances.

Article 2.

Conveyances by Husband and Wife.

Sec.

39-10. [Repealed.]

39-12. Power of attorney of married person.

39-13.2. Married persons under 18 made competent as to certain transactions; certain transactions validated.

39-13.3. Conveyances between husband and wife.

39-13.4. Conveyances by husband or wife under deed of separation.

39-13.5. Creation of tenancy by entirety in partition of real property.

Article 5.

Sale of Building Lots in North Carolina.

39-28, 39-29. [Repealed.]

Sec.

39-30. (Repealed effective July 1, 1982) Investigation by clerk; bond, or other securities.

39-31, 39-32. [Repealed.]

Article 7.

Uniform Vendor and Purchaser Risk Act.

39-40 to 39-43. [Reserved.]

Article 8.

Business Trusts.

39-44. Definition.

39-45. Authority to acquire and hold real estate.

39-46. Title vested; conveyance; probate.

39-47. Prior deeds validated.

ARTICLE 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

Legal Periodicals. — For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For a note on the continued use of the Artis-Oxendine rule in the construction of deeds, see 13 Wake Forest L. Rev. 478 (1977).

CASE NOTES

Fee Simple Presumed, etc. —

The law favors creation of a fee simple estate unless it is clearly shown a lesser estate was intended. Vestal v. Vestal, 49 N.C. App. 263, 271 S.E.2d 306 (1980).

Applied in Crawford v. Wilson, 43 N.C. App. 69, 257 S.E.2d 696 (1979).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

Legal Periodicals. — For a note on the continued use of the Artis-Oxendine rule in the construction of deeds, see 13 Wake Forest L. Rev. 478 (1977).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

CASE NOTES

Legislative Intent. — By the passage of this section it would appear that it is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. Whetsell v. Jernigan, 291 N.C. 128, 229 S.E.2d 183 (1976); Johnson v. Burrow, 42 N.C. App. 273, 256 S.E.2d 811 (1979).

This section does not apply to conveyances executed prior to January 1, 1968. Whetsell v. Jernigan, 291 N.C. 128, 229 S.E.2d 183 (1976); Gamble v. Williams, 39 N. C. App. 630, 251 S.E.2d 625 (1979).

Construction of Conveyances Executed Prior to January 1, 1968. — Since the General Assembly provided that this section should apply to all conveyances executed after January 1, 1968, the court should not change the proposition voiced in Artis v. Artis, 228 N.C. 754, 47 S.E.2d 228 (1948) and Oxendine v. Lewis, 252 N.C. 669, 114 S.E.2d 706 (1960) and other earlier cases in interpreting conveyances executed prior to that date. Waters v. North Carolina Phosphate Corp., 32 N.C. App. 305, 232 S.E.2d 275, cert. denied, 292 N.C. 470, 233 S.E.2d 925 (1977); Gamble v. Williams, 39 N.C. App. 630, 251 S.E.2d 625 (1979).

Applied in Waters v. North Carolina Phosphate Corp., 50 N.C. App. 252, 273 S.E.2d 517 (1981).

§ 39-6. Revocation of deeds of future interests made to persons not in esse.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

Applied in Wachovia Bank & Trust Co. v. Sevier, 41 N.C. App. 762, 255 S.E.2d 636, cert. denied, 298 N.C. 304, 259 S.E.2d 305 (1979).

§ 39-6.1. Validation of deeds of revocation of conveyances of future interests to persons not in esse.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 39-6.2. Creation of interest or estate in personal property.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For an article entitled, "The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation," see 11 N.C. Cent. L.J. 362 (1980).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7.1. Certain instruments affecting married woman's title not executed by husband validated.

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

CASE NOTES

Quoted in Faucette v. Griffin, 35 N.C. App. 7, 239 S.E.2d 712 (1978).

§ 39-10: Repealed by Session Laws 1977, c. 375, s. 16, effective January 1, 1978.

Editor's Note. — Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 39-12. Power of attorney of married person.

Every competent married person of lawful age is authorized to execute, without the joinder of his or her spouse, instruments creating powers of attorney affecting the real and personal property of such married person naming either third parties or, subject to the provisions of G.S. 52-10 or 52-10.1, his or her spouse as attorney-in-fact. When such a married person executes a power of attorney authorized by the preceding sentence naming his or her spouse as attorney in fact the acknowledgment by the spouse of the grantor is not necessary. Such instruments may confer upon the attorney, and the attorney may exercise, any and all powers which lawfully can be conferred upon an attorney-in-fact, including, but not limited to, the authority to join in conveyances of real property for the purpose of waiving or quitclaiming any rights which may be acquired as a surviving spouse under the provisions of G.S. 29-30. (1798, c. 510; R. C., c. 37, s. 11; Code, s. 1257; Rev., s. 957; C. S., s. 1002; 1965, c. 856; 1977, c. 375, s. 7; 1979, c. 528, s. 8.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-6" in the first sentence.

The 1979 amendment added the second sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Session Laws 1979, c. 525, s. 9, provides: "A power of attorney executed by a married person naming his or her spouse as attorney in fact during the period between January 1, 1978, and the effective date of this act [May 8, 1979] shall not be invalid because the spouse named as attorney in fact did not acknowledge the power of attorney if otherwise executed in accordance with G.S. 39-12."

Session Laws 1979, c. 525, s. 12, provides that the amendment to this section shall not affect pending litigation.

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.

CASE NOTES

In determining the validity of a 1922 deed from a wife to a husband which was required to be in writing and acknowledged before a certifying officer who was required to make a private examination of the wife touching upon her voluntary execution of the contract, where the only omission was the certificate that the deed was not unreasonable or injurious to her and the deed was in all other respects regular, and there was no contention that there was any defect in the premises, the granting clause, the description, the habendum, or the warranties or that there was anything about the deed which was not regular except the lack of the certificate of the certifying officer as to injury or unreasonableness, this was certainly one of the situations to which this section was intended to apply. Otherwise, the curative statute would be stripped of all meaning. The deed was validated by subsection (b) of this section. Johnson v. Burrow, 42 N.C. App. 273, 256 S.E.2d 811 (1979).

Stated in Faucette v. Griffin, 35 N.C. App. 7, 239 S.E.2d 712 (1978).

Cited in DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

§ 39-13.2. Married persons under 18 made competent as to certain transactions; certain transactions validated.

(b) Any transaction between a husband and wife pursuant to this section shall be subject to the provisions of G.S. 52-10 or 52-10.1 whenever applicable. (1977, c. 375, s. 8.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-6" in subsection (b).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

§ 39-13.3. Conveyances between husband and wife.

(e) Any conveyance authorized by this section is subject to the provisions of G.S. 52-10 or 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary. (1957, c. 598, s. 1; 1965, c. 878, s. 3; 1977, c. 375, s. 9.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, deleted "by a wife" following "conveyance" near the beginning of subsection (e) and substituted "G.S. 52-10 or 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary" for "G.S. 52-6" at the end of subsection (e).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

Legal Periodicals. — For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

CASE NOTES

Effect of Separation Agreement on Tenancy by Entirety. — Subsection (c) of this section was not applicable in a divorce action on the issue of whether a separation agreement contractually altered the character of the ownership of a tenancy by the entirety. Branstetter v. Branstetter, 36 N.C. App. 532, 245 S.E.2d 87 (1978).

Cited in Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979).

§ 39-13.4. Conveyances by husband or wife under deed of separation.

Any conveyance of real property, or any interest therein, by the husband or wife who have previously executed a valid and lawful deed of separation which authorizes said husband or wife to convey real property or any interest therein without the consent and joinder of the other and which deed of separation or a memorandum of the deed of separation setting forth such authorization is recorded in the county where the land lies, shall be valid to pass such title as the conveying spouse may have to his or her grantee and shall pass such title free and clear of all rights in such property and free and clear of such interest in property that the other spouse might acquire solely as a result of the marriage, including any rights arising under G.S. 29-30, unless an instrument in writing canceling the deed of separation or memorandum thereof and properly executed and acknowledged by said husband and wife is recorded in the office of said register of deeds. The instrument which is registered under this section to authorize the conveyance of an interest in real property or the cancellation of the deed of separation or memorandum thereof shall comply with the provisions of G.S. 52-10 or 52-10.1.

All conveyances of any interest in real property by a spouse who had previously executed a valid and lawful deed of separation, or separation agreement, or property settlement, which authorized the parties thereto to convey real property or any interest therein without the consent and joinder of the other, when said deed of separation, separation agreement, or property settlement, or a memorandum of the deed of separation, separation agreement, property settlement, setting forth such authorization, had been previously recorded in the county where the property is located, and when such conveyances were executed before October 1, 1981, shall be valid to pass such title as the conveying spouse may have to his or her grantee, and shall pass such to him free and clear of rights in such property and free and clear of such interest in such property that the other spouse might acquire solely as a result of the marriage, including any rights arising under G.S. 29-30, unless an instrument in writing canceling the deed of separation, separation agreement, or property settlement, or memorandum thereof, properly executed and acknowledged by said husband and wife, is recorded in the office of said register of deeds. The instrument which is registered under this section to authorize the conveyance of an interest in real property or the cancellation of the deed of separation, separation agreement, property settlement, or memorandum thereof shall comply with G.S. 52-10 or 52-10.1. (1959, c. 512; 1973, c. 133; 1977, c. 375, s. 10; 1981, c. 599, ss. 10, 11.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "the provisions of G.S. 52-10 or 52-10.1" for "G.S. 52-6 with respect to a certificate of private examination of the wife" at the end of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

The 1981 amendment, effective Oct. 1, 1981, substituted "conveying spouse" for "husband or wife", and inserted the language beginning "and shall pass such title free and clear" and ending "arising under G.S. 29-30," near the end of the first sentence of the first paragraph. The amendment also added the second paragraph.

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

§ 39-13.5. Creation of tenancy by entirety in partition of real property.

When either a husband or a wife owns an undivided interest in real property as a tenant in common with some person or persons other than his or her spouse and there occurs an actual partition of the property, a tenancy by the entirety may be created in the husband or wife who owned the undivided interest and his or her spouse in the manner hereinafter provided:

(1) In a division by cross-deed or deeds, between or among the tenants in common provided that the intent of the tenant in common to create a tenancy by the entirety with his or her spouse in this exchange of deeds must be clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that the deed or deeds to such tenant in common and his or her spouse is signed by such tenant in common and is acknowledged before a certifying officer in accordance with G.S. 52-10;

(2) In a judicial proceeding for partition. In such proceeding, both spouses have the right to become parties to the proceeding and to have their pleadings state that the intent of the tenant in common is to create a tenancy by the entirety with his or her spouse. The order of partition shall provide that the real property assigned to such tenant and his or her spouse shall be owned by them as tenants by the entirety. (1969, c. 748, s. 1; 1977, c. 375, s. 11.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, rewrote the language following "further provided that" in subdivision (1) and deleted the proviso at the end of the third sentence of subdivision (2).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

CASE NOTES

Stated in Miller v. Miller, 34 N.C. App. 209, 237 S.E.2d 552 (1977).

Cited in Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979).

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

Legal Periodicals. — For an analysis and comparison of the law of fraudulent conveyances in North Carolina with the Uniform Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in Cowart v. Whitley, 39 N.C. App. 662, 251 S.E.2d 627 (1979).

II. WHAT CONVEYANCES FRAUDULENT.

A. In General.

Rule Stated. —
In accord with original. See North Carolina Nat'l Bank v. Evans, 35 N.C. App. 322, 241 S.E.2d 379 (1978), rev'd on other grounds, 296 N.C. 374, 250 S.E.2d 231 (1979); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979); Wurlitzer Distrib. Corp. v. Schofield, 44 N.C. App. 520, 261 S.E.2d 688 (1980).

Prerequisites for Establishing Fraud. — When a conveyance is made by a debtor for valuable consideration, it is fraudulent and may be set aside only when the conveyance was (1) made with the intent to defraud creditors, and (2) the grantee either participated in the intent or had notice of it. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

Effect of Consideration. —
A valuable consideration in the law of fraudulent conveyance is not the same as a valuable consideration in the law of contracts. North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

Valuable consideration is deemed to have been given by the transferee when he suffers a legal detriment and the transferor receives a corresponding benefit. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

Intent to defraud creditors may be presumed when the debtor does not retain property sufficient to pay his then-existing debts. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

A deed of trust or a mortgage made to secure an existing debt is a conveyance for a valuable consideration. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

Voluntariness of Conveyance. — A conveyance is voluntary when it is not for value, i.e., when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

A conveyance is deemed to be voluntary when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud. North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

A determination that a conveyance was not made for valuable consideration means that the conveyance was "voluntary." North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

If a conveyance is voluntary, and the grantor fails to retain sufficient assets to pay his then-existing indebtedness, such conveyance is invalid as to creditors. Tuttle v. Tuttle, 38 N.C. App. 651, 248 S.E.2d 896 (1978), cert. denied, 296 N.C. 589, 254 S.E.2d 32 (1979).

B. Intent.

Sufficiency of Intent. —
In accord with original. See Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Family Relationship as Evidence of Intent. — When property is sold to a family member for less than its reasonable value and the grantor is unable to pay his debts, the close family relationship is strong evidence of fraudulent intent. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Intent Shown by Acts and Conduct. — It is not necessary that intent to defraud be proven by expressed declarations, but it may be shown by the acts and conduct of the parties, from which it may be reasonably inferred. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

IV. RIGHTS AND REMEDIES OF CREDITORS.

Action Commenced Prior to Transfer of Assets. — A creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets has been accomplished. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

§ 39-16. Conveyance with intent to defraud purchasers void.

Legal Periodicals. — For an analysis and comparison of the law of fraudulent conveyances in North Carolina with the Uniform Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

§ 39-17. Voluntary conveyance evidence of fraud as to existing creditors.

Legal Periodicals. — For an analysis and comparison of the law of fraudulent conveyances in North Carolina with the Uniform Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

CASE NOTES

Sufficiency of Property Retained. — Creditor's motion for summary judgment was properly granted where the record showed that the creditor met his burden of proof by uncontroverted evidence that immediately after the conveyances in question, defendant owed plaintiff $56,000, and that she had property worth only $300.00. North Carolina Nat'l Bank v. Johnson Furn. Co., 34 N.C. App. 134, 237 S.E.2d 313 (1977).

Presumptions and Burden of Proof. — The ultimate burden of proof rests upon the plaintiff to show either actual intent by the defendant grantors to defraud their creditors or failure by them to retain property sufficient to pay the then-existing debts. North Carolina Nat'l Bank v. Johnson Furn. Co., 34 N.C. App. 134, 237 S.E.2d 313 (1977).

Voluntariness of Conveyance. — A conveyance is voluntary when it is not for value, i.e., when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Family Relationship as Evidence of Intent. — When property is sold to a family member for less than its reasonable value and the grantor is unable to pay his debts, the close family relationship is strong evidence of fraudulent intent. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Intent Shown by Acts and Conduct. — It is not necessary that intent to defraud be proven by expressed declarations, but it may be shown by the acts and conduct of the parties, from which it may be reasonably inferred. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Creditor's Action Prior to Transfer of Assets. — A creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets has been accomplished. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Protection for All Creditors. — One need not be a judgment creditor to be entitled to the protection of this section. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

§ 39-19. Purchasers for value and without notice protected.

Legal Periodicals. — For an analysis and comparison of the law of fraudulent conveyances in North Carolina with the Uniform Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

ARTICLE 5.

Sale of Building Lots in North Carolina.

§§ 39-28, 39-29: Repealed by Session Laws 1981, c. 358, effective July 1, 1982.

Cross References. — For these sections as in effect until July 1, 1982, see the bound volume.

§ 39-30. (Repealed effective July 1, 1982) Investigation by clerk; bond, or other securities.

(a) Upon the filing of said application and the certificate of the cost of the improvement, the clerk of the court shall satisfy himself that the land or lots are located in his county and he shall also satisfy himself of the genuineness of the application and certificate of the certified engineer or county surveyor, and shall, if so satisfied, require a good and sufficient bond, in a sum equal to the amount certified by the certified engineer or county surveyor as the approximate cost of the improvement or improvements, with a corporation licensed to do business in the State of North Carolina as surety thereon, conditioned to save the purchaser or purchasers of each lot or lots harmless to the amount of the estimated and certified cost of the proposed improvement on each lot or lots so purchased; or require (at the option of the person, firm or corporation desiring to offer the lot or lots for sale, provided that such person, firm, or corporation can establish to the satisfaction of the clerk, by sworn financial statement or otherwise, his, their, or its net worth, as of the date of the application, is equal to or greater than fifty percent (50%) of the amount certified as set forth in G.S. 39-29, above) a personal or corporate (as the case may be) guaranty in a sum equal to the amount certified by the certified engineer or county surveyor as the approximate cost of the improvement or improvements, conditioned to save the purchaser or purchasers of each lot or lots harmless to the amount of the estimated and certified cost of the proposed improvement on each lot or lots so purchased.

(b) In lieu of the bond specified in paragraph (a) above, the person, firm or corporation seeking the permit may deposit with said clerk of court certificates of deposit, letters of credit and/or securities satisfactory to the clerk of a fair market value at least equal to one-half of the amount certified by the certified engineer or county surveyor as the approximate cost of the improvement or improvements. The certificates, letters of credit and/or securities so deposited with the clerk of court shall be held in trust for the sole protection and benefit of the purchaser or purchasers of said lot or lots from said person, firm or corporation pursuant to this Article. A pro rata portion of the certificates, letters of credit and/or securities shall be returned to the person, firm or corporation to whom such permit is issued when the clerk of court is satisfied that the value of the deposited certificates, letters of credit and/or securities is in excess of the amount required to equal one-half of the remaining cost of the then uncompleted improvements proposed to be made on each lot covered by the permit, and all the certificates, letters of credit and/or securities shall be returned if the clerk of court is satisfied that all of the improvements represented or agreed to be made have been completed. The clerk of court may sell or transfer any and all of said certificates, letters of credit and/or securities or utilize the proceeds thereof for the purpose specified in paragraph (a) above. With the certificates, letters of credit and/or securities deposited with the clerk of court, the person, firm or corporation applying for such permit pursuant to this section shall at the same time deliver to the clerk of court a power of attorney, in a form acceptable to the clerk of court, executed and acknowledged by the applicant authorizing the sale or transfer of said certificates, letters of credit and/or securities or any part thereof in order to satisfy the obligations pursuant to this section.

(c) Permits issued by the clerk of court pursuant to this section shall constitute a lien on each lot described in said permit to the extent of the amount certified by the certified engineer or county surveyor as the approximate cost of the improvement or improvements thereon agreed to be made by the person, firm, or corporation receiving said permit. Provided, however, said lien shall not attach if a surety bond is posted pursuant to paragraph (a) above, or if certificates, letters of credit and/or securities are deposited pursuant to paragraph (b) above. Provided further, that such lien shall not have priority over any existing perfected lien or security interest.

(d) The clerk shall release by instrument recorded in the office of the register of deeds any lien created under this Article upon a showing satisfactory to the clerk that all direct improvements to that particular lot pursuant to the application and to the certificate of the certified engineer or county surveyor have been completed.

(e) Upon filing of a sworn, written request by the person, firm or corporation holding a permit pursuant to this Article requesting the cancellation of such permit, the clerk of court shall determine that all work commenced has been completed in accordance with the application and the certificate of the cost of the improvement and that no purchaser or purchasers of lots will be directly damaged by the cancellation of the permit. Upon such finding the clerk of court shall cancel the permit and return to the person, firm or corporation all forms of evidence of bond, certificates of deposit, letters of credit and/or securities posted to secure performance and the clerk of court shall cancel all liens created by this Article. No permit may be reinstated after cancellation except pursuant to the procedures for a new application under this Article. (1927, c. 210, s. 3; 1979, c. 395, s. 1.)

Effect of Amendments. — The 1979 amendment designated the former section as subsection (a) and added subsections (b), (c), (d) and (e). In subsection (a) the amendment inserted the word "certified" preceding "engineer or county surveyor" in both places where those words appear, and, at the end of the subsection, added the language beginning "or require (at the option . . ."

Session Laws 1979, c. 395, s. 2, provides: "This act shall be effective upon ratification and shall apply to all applications for permit filed after the effective date [April 18, 1979]."

Section Repealed Effective July 1, 1982. — This section is repealed, effective July 1, 1982, by Session Laws 1981, c. 358.

§§ 39-31, 39-32: Repealed by Session Laws 1981, c. 358, effective July 1, 1982.

Cross References. — For these sections as in effect until July 1, 1982, see the bound volume.

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-37. Short title.

Legal Periodicals. — For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

§ 39-38. Uniformity of interpretation.

Legal Periodicals. — For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

§ 39-39. Risk of loss.

Legal Periodicals. — For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

§§ 39-40 to 39-43: Reserved for future codification purposes.

ARTICLE 8.

Business Trusts.

§ 39-44. Definition.

The term "business trust" whenever used or referred to in this Article shall mean any unincorporated association, including but not limited to a Massachusetts business trust, engaged in any business or trade under a written instrument or declaration of trust under which the beneficial interest therein is divided into shares represented by certificates or shares of beneficial interest. (1977, c. 768, s. 1.)

Editor's Note. — Session Laws 1977, c. 768, s. 2, provides in part that the act shall not affect pending litigation.

Legal Periodicals. — For a survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

§ 39-45. Authority to acquire and hold real estate.

Business trusts are hereby authorized and empowered to acquire real estate and interests therein and to hold the same in their trust names and may sue and be sued in their trust names. (1977, c. 768, s. 1.)

§ 39-46. Title vested; conveyance; probate.

Where real estate has been or may be hereafter conveyed to a business trust in its trust name or in the names of its trustees in their capacity as trustees of such business trust, the said title shall vest in said business trust, and the said real estate and interests therein may be conveyed, encumbered or otherwise disposed of by said business trust in its trust name by an instrument signed by at least one of its trustees, its president, a vice-president or other duly authorized officer, and attested or countersigned by its secretary, assistant secretary or such other officer as is the custodian of its common seal, not acting in dual capacity, with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for conveyances by corporations. Any conveyance, encumbrance or other disposition thus made by any such business trust shall convey good and sufficient title to said real estate and interests therein in accordance with the provisions of said conveyance; provided, however, that with respect to any such conveyance, encumbrance or other disposition effected after June 28, 1977, there must be recorded in the county where the land lies a memorandum of the written instrument or declaration of trust referred to in G.S. 39-44. As a minimum such memorandum shall set forth the name, date and place of filing, if any, of such written instrument or declaration of trust, and the place where the written instrument or declaration of trust, and all amendments thereto, is kept and may be examined upon reasonable notice, which place need not be a public office. (1977, c. 768, s. 1.)

§ 39-47. Prior deeds validated.

All deeds, leases, mortgages, deeds of trust or other conveyances heretofore executed in conformity with this Article and which are proper in all other respects are declared to be sufficient to pass title to real estate held by such business trusts in accordance with the provisions of such instruments. (1977, c. 768, s. 1.)

Chapter 40.

Eminent Domain.

§§ 40-1 to 40-53: Repealed by Session Laws 1981, c. 919, s. 1, effective January 1, 1982.

Cross References. — For present provisions as to eminent domain, see Chapter 40A.

Editor's Note. — Section 40-7.1, relating to compensation for taking of water and sewer facilities by political subdivisions, was also repealed by Session Laws 1981, c. 627, effective upon ratification, June 19, 1981.

Chapter 40A.

Eminent Domain.

Article 1.

General.

Sec.

40A-1. Exclusive provisions.
40A-2. Definitions.
40A-3. By whom right may be exercised.
40A-4. No prior purchase offer necessary.
40A-5. Condemnation of property owned by other condemnors.
40A-6. Reimbursement of owner for taxes paid on condemned property.
40A-7. Acquisition of whole parcel or building.
40A-8. Costs.
40A-9. Removal of structures on condemned land; lien.
40A-10. Sale or other disposition of land condemned.
40A-11. Right of entry prior to condemnation.
40A-12. Additional rules.
40A-13. Costs and appeal.
40A-14 to 40A-18. [Reserved.]

Article 2.

Condemnation Proceedings by Private Condemnors.

40A-19. Proceedings by private condemnors.
40A-20. Petition filed; contents.
40A-21. Notice of proceedings.
40A-22. Service.
40A-23. Service where parties unknown.
40A-24. Orders served as in special proceedings in absence of other provisions.
40A-25. Answer to petition; hearing; commissioners appointed.
40A-26. Powers and duties of commissioners.
40A-27. Form of commissioners' report.
40A-28. Exceptions to report; hearing; when title vests; appeal; restitution.
40A-29. Provision for jury trial on appeal.
40A-30. Title of infants, incompetents, inebriates, and trustees without power of sale, acquired.
40A-31. Rights of claimants of fund determined.
40A-32. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.
40A-33. Change of ownership pending proceedings.
40A-34. Defective title; how cured.
40A-35 to 40A-39. [Reserved.]

Article 3.

Condemnation by Public Condemnors.

40A-40. Notice of action.
40A-41. Institution of action and deposit.
40A-42. Vesting of title and right of possession; injunction not precluded.
40A-43. Memorandum of action.
40A-44. Disbursement of deposit.
40A-45. Answer, reply and plat.
40A-46. Time for filing answer; failure to answer.
40A-47. Determination of issues other than damages.
40A-48. Appointment of commissioners.
40A-49. No request for commissioners.
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ARTICLE 1.

General.

§ 40A-1. Exclusive provisions.

It is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors. All other provisions in laws, charters, or local acts authorizing the use of other procedures by municipal or county governments or agencies or political subdivisions thereof, or by corporations, associations or other persons are hereby repealed effective January 1, 1982. Provided, that any condemnation proceeding initiated prior to January 1, 1982, may be lawfully completed pursuant to the provisions previously existing.

This chapter shall not repeal any provision of a local act enlarging or limiting the purposes for which property may be condemned. Notwithstanding the language of G.S. 40A-3(b), this Chapter also shall not repeal any provision of a local act creating any substantive or procedural requirement or limitation on the authority of a local public condemnor to exercise the power of eminent domain outside of its boundaries. (1981, c. 919, s. 1.)

Editor's Note. — Session Laws 1981, c. 919, s. 33, makes the act effective Jan. 1, 1982.

§ 40A-2. Definitions.

As used in this Chapter the following words and phrases have the meanings indicated unless the context clearly requires another meaning:

(1) "Condemnation" means the procedure prescribed by law for exercising the power of eminent domain.

(2) "Condemnor" means those listed in G.S. 40A-3.

(3) "Eminent domain" means the power to divest right, title or interest from the owner of property and vest it in the possessor of the power against the will of the owner upon the payment of just compensation for the right, title or interest divested.

(4) "Judge" means a resident judge of the superior court in the district where the cause is pending, or special judge residing in said district, or a judge of the superior court assigned to hold the courts of said district or an emergency or special judge holding court in the county where the cause is pending.

(5) "Owner" includes the plural when appropriate and means any person having an interest or estate in the property.

(6) "Person" includes the plural when appropriate and means a natural person, and any legal entity capable of owning or having interest in property.

(7) "Property" means any right, title, or interest in land, including leases and options to buy or sell. "Property" also includes rights of access, rights-of-way, easements, water rights, air rights, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land. (1981, c. 919, s. 1.)

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities, substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding ordered by the Utilities Commission as provided in G.S. 62-232.

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to

the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision in in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B.

(9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by other statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Article 12 of Chapter 130 for the purpose stated in that Article.

(2) The board of commissioners of a mosquito control district established under the provisions of Article 24 of Chapter 130 for the purposes stated in that Article.

(3) A hospital authority established under the provisions of Article 12 of Chapter 131 for the purposes stated in that Article, provided, however, that the provisions of G.S. 131-112 shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article, provided, however, the provisions of G.S. 162A-7 shall continue to apply.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.

(10) A district established under the provisions of Article 5 of Chapter 162 for purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R. C., c. 61, s. 9; 1874-5, c. 83; Code s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C. S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1.)

Cross References. — As to the power of local governments and water companies to condemn land for public water systems, see § 130-166.47.

CASE NOTES

The language "pipelines originating in North Carolina" in former § 40-2 held not to impose a limitation on § 62-190. See Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

§ 40A-4. No prior purchase offer necessary.

The power to acquire property by condemnation shall not depend on any prior effort to acquire the same property by gift or purchase, nor shall the power to negotiate for the gift or purchase or property be impaired by initiation of condemnation proceedings. (1981, c. 919, s. 1.)

§ 40A-5. Condemnation of property owned by other condemnors.

(a) A condemnor listed in G.S. 40A-3(a), (b) or (c) shall not possess the power of eminent domain with respect to property owned by the State of North Carolina unless the State consents to the taking. The State's consent shall be given by the Council of State, or by the Secretary of Administration if the Council of State delegates this authority to him. In a condemnation proceeding against State property consented to by the State, the only issue shall be the compensation to be paid for the property.

(b) Unless otherwise provided by statute a condemnor listed in G.S. 40A-3(a), (b) or (c) may condemn the property of a private condemnor if such property is not in actual public use or not necessary to the operation of the business of the owner. Unless otherwise provided by statute a condemnor listed in G.S. 40A-3(b) or (c) may condemn the property of a condemnor listed in G.S. 40A-3(b) or (c) if the property proposed to be taken is not being used or held for future use for any governmental or proprietary purpose. (1981, c. 919, s. 1.)

§ 40A-6. Reimbursement of owner for taxes paid on condemned property.

An owner whose property is totally taken in fee simple by a condemnor exercising the power of eminent domain, under this Chapter or any other statute shall be entitled to reimbursement from the condemnor of the pro rata portion of real property taxes paid by the owner which are allocable to a period subsequent to vesting of title in the condemnor, or the effective date of possession of such real property, whichever is earlier. (1975, c. 439, s. 1; 1981, c. 919, s. 1.)

§ 40A-7. Acquisition of whole parcel or building.

(a) When the proposed project requires condemnation of only a portion of a parcel of land leaving a remainder of such shape, size or condition that it is of little value, a condemnor may acquire the entire parcel by purchase or condemnation. If the remainder is to be condemned the petition filed under the provisions of G.S. 40A-20 or the complaint filed under the provisions of G.S. 40A-41 shall include:

(1) A determination by the condemnor that a partial taking of the land would substantially destroy the economic value or utility of the remainder; or

(2) A determination by the condemnor that an economy in the expenditure of public funds will be promoted by taking the entire parcel; or

(3) A determination by the condemnor that the interest of the public will be best served by acquiring the entire parcel.

(b) Residues acquired under this section may be sold or disposed of in any manner provided for the disposition of property, or may be exchanged for other property needed by the condemnor.

(c) When the proposed project requires condemnation of a portion of a building or other structure, the condemnor may acquire the entire building or structure by purchase or condemnation, together with the right to enter upon the surrounding land for the purpose of removing the building or structure. If the entire building is to be condemned the petition filed under the provisions of G.S. 40A-20, or the complaint filed under the provisions of G.S. 40A-41 shall include a determination by the condemnor either:

(1) That an economy in the expenditure of public funds will be promoted by acquiring the entire building or structure; or

(2) That it is not feasible to cut off a portion of the building or structure without destroying the whole; or

(3) That the convenience, safety, or improvement of the project will be promoted by acquiring the entire building or structure. Nothing in this subsection shall be deemed to compel the condemnor to condemn the underlying fee of the portion of any building or structure that lies outside the project. (1981, c. 919, s.1.)

§ 40A-8. Costs.

(a) In any action under the provisions of Article 2 or Article 3 of this Chapter, the court in its discretion may award to the owner a sum to reimburse the owner for charges he has paid for appraisers, engineers and plats, provided such appraisers or engineers testify as witnesses, and such plats are received into evidence as exhibits by order of the court.

(b) If a condemnor institutes a proceeding to acquire by condemnation any property and (i) if the final judgment in a resulting action is that the condemnor is not authorized to condemn the property, or (ii) if the condemnor abandons the action, the court with jurisdiction over the action shall after making appropriate findings of fact award each owner of the property sought to be condemned a sum that, in the opinion of the court based upon its findings of fact, will reimburse the owner for: his reasonable costs; disbursements; expenses (including reasonable attorney, appraisal, and engineering fees); and, any loss suffered by the owner because he was unable to transfer title to the property from the date of the filing of the complaint under G.S. 40A-41.

(c) If an action is brought against a condemnor under the provisions of G.S. 40A-20 or 40A-51 seeking compensation for the taking of any interest in property by the condemnor and judgment is for the owner the court shall award to the owner as a part of the judgment after appropriate finding of fact a sum that, in the opinion of the court based upon its finding of fact, will reimburse the owner as set out in subsection (b). (1981, c. 919, s. 1.)

§ 40A-9. Removal of structures on condemned land; lien.

At the request of the owner the condemnor shall allow the owner of property acquired by condemnation to remove any timber, building, permanent improvement, or fixture wholly or partially located on or affixed to the property unless such removal would be inconsistent with the purpose for which condemnation is made, and shall specify a reasonable time within which it may be removed. If the report of the commissioners deducted the value of any such property to be removed from the award of compensation and allowed the cost of removal as an element of damages and the owner fails to remove it within the time allowed, the condemnor may remove it and the cost of the removal and storage of the property shall be chargeable against the owner and a lien upon any remainder of the property not acquired by the condemnor to be recovered or foreclosed in the manner provided by law for recovery of debt or foreclosure of mortgages. (1981, c. 919, s. 1.)

§ 40A-10. Sale or other disposition of land condemned.

When any property condemned by the condemnor is no longer needed for the purpose for which it was condemned, it may be used for any other public purpose or may be sold or disposed of in the manner prescribed by law for the sale and disposition of surplus property. (1981, c. 919, s. 1.)

§ 40A-11. Right of entry prior to condemnation.

Any condemnor without having filed a petition or complaint, depositing any sum or taking any other action provided for in this Chapter, is authorized to enter upon any lands, but not structures, to make surveys, borings, examinations, and appraisals as may be necessary or expedient in carrying out and performing its rights or duties under this Chapter. The condemnor shall give 30 days' notice in writing to the owner at his last known address and the party in possession of the land of the intended entry authorized by this section.

Entry under this section shall not be deemed a trespass or taking within the meaning of this Chapter, however, the condemnor shall make reimbursement for any damage resulting from such activities, and the owner is entitled to bring an action to recover for the damage. If the owner recovers damages of twenty-five percent (25%) over the amount offered by the condemnor for reimbursement for its activities the court, in its discretion, may award reasonable attorney fees to the owner. (1981, c. 919, s. 1.)

§ 40A-12. Additional rules.

Where the procedure for conducting an action under this Chapter is not expressly provided for in this Chapter or by the statutes governing civil procedure, or where the civil procedure statutes are inapplicable, the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter. The practice in each case shall conform as near as may be to the practice in other civil actions. (1981, c. 919, s. 1.)

§ 40A-13. Costs and appeal.

In addition to any reimbursement provided for in G.S. 40A-8 the condemnor shall pay all court costs taxed by the court. Either party shall have a right of appeal to the appellate division for errors of law committed in any proceedings provided for in this Chapter in the same manner as in any other civil actions and it shall not be necessary that an appeal bond be posted. (1981, c. 919, s. 1.)

§§ 40A-14 to 40A-18: Reserved for future codification purposes.

Article 2.

Condemnation Proceedings by Private Condemnors.

§ 40A-19. Proceedings by private condemnors.

Any private condemnor enumerated in G.S. 40A-3(a), possessing by law the right of eminent domain in this State shall have the right to acquire property required for the purposes of its incorporation or for the purposes specified in this Chapter in the manner and by the special proceedings herein prescribed. (1871-2, c. 138, s. 13; Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1899, c. 64; 1901, cc. 6, 41, s. 2; 1903, c. 159, s. 16; c. 562; Rev., s. 2579; C. S., s. 1715; 1951, c. 59, s. 1; 1981, c. 919, s. 1.)

§ 40A-20. Petition filed; contents.

For the purpose of acquiring property a condemnor listed in G.S. 40A-3(a), or the owner of the property sought to be condemned, may present a petition to the clerk of the superior court of any county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. The petition shall be signed and verified. If filed by the condemnor, it must contain a description of the property which the condemnor seeks to acquire; and it must state that the condemnor is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of its public business, and the specific use of the property; and that the property described in the petition is required for the purpose of conducting the proposed business. The petition, if filed by the condemnor, must also contain a statement as to whether the owner will be permitted to remove all or a specified portion of any buildings, structures, permanent improvements, or fixtures situated on or affixed to the land. The petition, whether filed by the condemnor or the owner, must also state the names and places of residence of all other owners, so far as the same can by reasonable diligence be ascertained, or those who claim to be owners of the property. If any such persons are infants, their ages, as near as may be known, must be stated; and if any such persons are incompetents, inebriates or are unknown, that fact must be stated, together with any other allegations and statements of liens or encumbrances on the property which the condemnor or the owner may see fit to make.

Nothing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property. (1871-2, c. 138, s. 14; Code, s. 1944; 1893, c. 396; Rev., s. 2580; 1907, c. 783, s. 3; C. S., s. 1716; 1981, c. 919, s. 1.)

CASE NOTES

Necessity of Taking Is Legislative Question. — As a general rule, once the public purpose is established, the necessity or expediency of the taking is a legislative, and not a judicial question. Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390, appeal dismissed, 295 N.C. 548, 248 S.E.2d 726 (1978), cert. denied, 440 U.S. 912, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979), (decided under former § 40-12).

Judicial Inquiry into Allegations of Bad Faith. — Upon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion by the condemnor, the issue raised becomes the subject of judicial inquiry as a question of fact to be determined by the judge. Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390, appeal dismissed, 295 N.C. 548, 248 S.E.2d 726 (1978), cert. denied, 440 U.S. 912, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979), (decided under former § 40-12).

§ 40A-21. Notice of proceedings.

Notice of all proceedings brought hereunder shall be filed with the clerk of superior court of each county in which any part of the land is located in the form and manner provided by G.S. 1-116, and the clerk shall index and cross-index this notice as required by G.S. 1-117. In the record of lis pendens and in the judgment docket required by G.S. 7A-109 the clerk shall always index the name of the condemnor as the plaintiff and the name of the property owner as the defendant irrespective of whether the condemning party is the plaintiff or defendant. The filing of such notice shall be constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the condemnor shall take all property condemned under this Article free of the claims of any such person. (1969, c. 864; 1981, c. 919, s. 1.)

§ 40A-22. Service.

A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose estates or interests are to be affected by the proceedings, at least 10 days prior to the hearing of the same by the court. (1871-2, c. 138, s. 14; Code, s. 1944; Rev., s. 2581; C. S., s. 1717; 1981, c. 919, s. 1.)

§ 40A-23. Service where parties unknown.

If the person on whom service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then service may be made by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in accordance with the provisions of G.S. 1A-1, Rule 4(j)(9)c. In such cases the State Treasurer shall be served as custodian of the Escheat Fund and may become a party to the action. (Code, s. 1944, subsec. 5; Rev., s. 2582; C. S., s. 1718; 1971, c. 1093, s. 18; 1981, c. 919, s. 1.)

CASE NOTES

When service by publication inadequate. — Service by publication is not an adequate substitute for actual notice, when giving actual notice to identified parties is neither impossible, impractical, nor unreasonable. United States v. Chatham, 323 F.2d 95 (4th Cir. 1963), (decided under former § 40-14).

When condemnation plaintiffs take the easy course, they should not be heard to say that the proceedings had upon published notice addressed to unknown persons foreclosed the rights of interested parties who were readily identifiable and easily served, particularly when the condemnation plaintiff knew, or should have known, that the unidentified persons had a substantial interest in the litigation. United States v. Chatham, 323 F.2d 95 (4th Cir. 1963), (decided under former § 40-14).

§ 40A-24. Orders served as in special proceedings in absence of other provisions.

In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this Chapter may be made as in other special proceedings. (Code, s. 1944, subsec. 7; Rev., s. 2583; C. S., s. 1719; 1981, c. 919, s. 1.)

§ 40A-25. Answer to petition; hearing; commissioners appointed.

On presenting such petition to the clerk of superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same. The clerk shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, shall make an order for the appointment of three commissioners and shall fix the time and place for the first meeting of the commissioners. Each commissioner shall be a resident of the county wherein the property being condemned lies who has no right, title, or interest in or to the property condemned, is not related within the third degree to the owner or to the spouse of the owner, is not an officer, employee or agent of the condemnor, and is disinterested in the rights of the parties in every way. (1871-2, c. 138, s. 15; Code, s. 1945; Rev., s. 2584; C. S., s. 1720; 1981, c. 919, s. 1.)

§ 40A-26. Powers and duties of commissioners.

The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the property in the petition. Any one of them may issue subpoenas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the clerk or pursuant to adjournment, they shall cause 10 days' notice of such meeting to be given to the parties who are affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing. After the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of the commissioners being present and acting, shall ascertain and determine the compensation which ought justly to be made by the condemnor to the owners of the property appraised by them. The commissioners shall determine the compensation to be awarded in accordance with the principles established by Article 4 of this Chapter. They shall report the same to the clerk within 10 days. (1871-2, c. 138, ss. 16-18; Code, s. 1946; 1891, c. 160; Rev., s. 2585; C. S., s. 1721; 1981, c. 919, s. 1.)

§ 40A-27. Form of commissioners' report.

When the commissioners shall have assessed the compensation, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of ......:

We, ..., commissioners appointed by the court to assess the damages that have been and will be sustained by ......, the owner of certain property lying in the county of ...., which ...... the condemnor proposes to condemn for its use, do hereby certify that we met on ...... (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the property aforesaid, and all other inconveniences likely to result to the owner, we have estimated and do assess the compensation aforesaid at the sum of $.......

Given under our hands, the ...... day of ......, A.D. 19....

(R. C., c. 61, s. 17; 1874-5, c. 83; Code, s. 1700; Rev., s. 2586; C. S., s. 1722; 1981, c. 919, s. 1.)

§ 40A-28. Exceptions to report; hearing; when title vests; appeal; restitution.

(a) Upon the filing of the report, the clerk shall forthwith mail copies to the parties. Within 20 days after the filing of the report any party to the proceedings may file exceptions thereto. The clerk, after notice to the parties, shall hear any exceptions so filed and may thereafter direct a new appraisal, modify or confirm the report, or make such other orders as the clerk may deem right and proper.

(b) If no exceptions are filed to the report, and if the clerk's final judgment rendered upon the petition and proceedings shall be in favor of the condemnor, and upon the deposit by the condemnor of the sum adjudged, together with all costs allowed, into the office of the clerk of superior court, then, in that event, all owners who have been made parties to the proceedings shall be divested of the property or interest therein to the extent set forth in the proceedings. A copy of the judgment, certified under the seal of the court, shall be registered in the county or counties where the land is situated, and the original judgment, or a certified copy thereof, or a certified copy of the registered judgment, may be given in evidence in all actions and proceedings as deeds for property are now allowed in evidence.

(c) Any party to the proceedings may file exceptions to the clerk's final determination on any exceptions to the report and may appeal to the judge of superior court having jurisdiction. Notice of appeal shall be filed within 10 days of the clerk's final determination. Upon appeal the clerk shall transfer the proceedings to the civil issue docket of the superior court. A judge in session shall hear and determine all matters in controversy and, subject to G.S. 40A-29 regarding trial by jury, shall determine any issues of compensation to be awarded in accordance with the provisions of Article 4 of this Chapter.

(d) Notwithstanding the filing of exceptions by any party to any orders or final determination of the clerk or the filing of a notice of appeal to the superior court, the condemnor may, at the time of the filing of the report of commissioners, deposit with the clerk of superior court in the proceedings the sum appraised by the commissioners and, in that event, the condemnor may enter, take possession of, and hold said property in the manner and to the extent sought to be acquired by the proceedings until final judgment is rendered on any appeal.

(e) If, on appeal, the judge shall refuse to condemn the property, then the money deposited with the clerk of court in the proceedings, or so much thereof as shall be adjudged, shall be refunded to the condemnor and the condemnor shall have no right to the property and shall surrender possession of the same, on demand, to the owner. The judge shall have full power and authority to make such orders, judgments and decrees as may be necessary to carry into effect the final judgment rendered in such proceedings, including compensation in accordance with the provisions of G.S. 40A-8.

(f) If the amount adjudged to be paid the owner of any property condemned under this Article shall not be paid within 60 days after final judgment in the proceedings, the right under the judgment to take the property shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against said claimant except the compensation awarded for the taking of the property.

(g) The provisions of this section shall not preclude any injunctive relief otherwise available to the owner or the condemnor. (Code, s. 1946; 1893, c. 148; Rev., s. 2587; 1915, c. 207; C. S., s. 1723; 1951, c. 59, s. 2; 1955, c. 29, s. 1; 1969, c. 44, s. 47; 1971, c. 528, s. 37; 1981, c. 919, s. 1.)

CASE NOTES

Stay of Entry within Discretion of Trial Court. — Trial court in an eminent domain proceeding did not err in refusing to stay petitioner's entry upon the land pending appeal, where petitioner had deposited with the clerk the full amount of compensation awarded by the commissioners; though the trial court was empowered to stay petitioner's entry upon the land, it was not required to do so; it lies in the sound discretion of the trial court to determine whether a temporary restraining order should be granted. Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 255 S.E.2d 225 (1979), (decided under former § 40-19).

§ 40A-29. Provision for jury trial on appeal.

In any proceedings under this Article by a condemnor to acquire property, any party to the proceedings shall be entitled on appeal to superior court to have the amount of compensation determined by a jury unless trial by jury has been waived by all parties. A jury shall determine the compensation to be awarded in accordance with the provisions of Article 4 of this Chapter. (1893, c. 148; Rev., s. 2588; C. S., s. 1724; 1957, c. 582; 1971, c. 528, s. 38; 1981, c. 919, s. 1.)

§ 40A-30. Title of infants, incompetents, inebriates, and trustees without power of sale, acquired.

In case any property required by a condemnor shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, incompetent, or inebriate, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, incompetent or inebriate, to sell and convey the same to such condemnor, on such terms as may be just. In case any infant, incompetent or inebriate has no general guardian or committee, the court may appoint a special guardian or committee for the purpose of making a sale, release or conveyance, and may require security from the general or special guardian or committee as the court may deem proper. Before any conveyance or release authorized by this section shall be executed, the terms on which it is to be executed shall be reported to the court on oath. If the court is satisfied that the terms are just to the owner of the property, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of the property having legal power to sell and convey the same. (1871-2, c. 138, s. 28; Code, s. 1956; Rev., s. 2590; C. S., s. 1726; 1981, c. 919, s. 1.)

§ 40A-31. Rights of claimants of fund determined.

If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the clerk or the judge on appeal may direct the money to be paid into the court by the condemnor, and may determine who is entitled to the same and direct to whom the same shall be paid, and may order a reference to ascertain the facts on which such determination and order are to be made. (1871-2, c. 138, s. 19; Code, s. 1947; Rev., s. 2591; C. S., s. 1727; 1981, c. 919, s. 1.)

§ 40A-32. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.

(a) The clerk or the judge on appeal shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services which shall be taxed in the bill of costs. In such cases the State Treasurer as custodian of the Escheat Fund shall be notified of the appointment of such an attorney.

(b) The clerk or the judge on appeal shall have power at any time to amend any defect or informality in any of the special proceedings authorized by this Chapter as may be necessary, or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving. (1871-2, c. 138, s. 20; Code, s. 1948; Rev., s. 2592; C. S., s. 1728; 1981, c. 919, s. 1.)

§ 40A-33. Change of ownership pending proceedings.

When any proceedings under this Article shall have been commenced, no change of ownership by voluntary conveyance or transfer of the property shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (1871-2, c. 138, s. 22; Code, s. 1950; Rev., s. 2594; C. S., s. 1730; 1981, c. 919, s. 1.)

§ 40A-34. Defective title; how cured.

If at any time after an attempt to acquire title under this Article has commenced it shall be found that the title thereby attempted to be acquired is defective, the condemnor may commence new proceedings to acquire or perfect such title in the same manner as if no previous attempt had been commenced. At any stage in the new proceedings the court may authorize the condemnor, if in possession, to continue in possession, and if not in possession, to take possession and use the property during the pendency and until the final conclusion of the new proceedings. If the condemnor pays into court a sum determined by the court to be adequate compensation for the property, the court, in its discretion, may stay all actions or proceedings against the condemnor for its possession. In every such case the party interested in the property may conduct the proceedings to a conclusion if the condemnor delays or omits to prosecute the same. (1871-2, c. 138, s. 23; Code, s. 1951; Rev., s. 2595; C. S., s. 1731; 1981, c. 919, s. 1.)

§§ 40A-35 to 40A-39: Reserved for future codification purposes.

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-40. Notice of action.

Not less than 30 days prior to the filing of a complaint under the provisions of G.S. 40A-41, a public condemnor listed in G.S. 40A-3(b) or (c) shall provide notice to each owner of its intent to institute an action to condemn property. The notice shall contain a general description of the property to be taken and of the amount estimated by the condemnor to be just compensation for the property to be condemned. The notice shall also state the purpose for which the property is being condemned and the date the condemnor intends to take possession of the property. (1981, c. 919, s. 1.)

§ 40A-41. Institution of action and deposit.

A public condemnor listed in G.S. 40A-3(b) or (c) shall institute a civil action to condemn property by filing in the superior court of any county in which the land is located a complaint containing a declaration of taking declaring that property therein is thereby taken for the use of the condemnor.

The complaint shall contain or have attached thereto the following:

(1) A statement of the authority under which and the public use for which the property is taken;
(2) A description of the entire tract or tracts of land affected by the taking sufficient for the identification thereof;
(3) A statement of the property taken and a description of the area taken sufficient for the identification thereof;
(4) The names and addresses of those persons who the condemnor is informed and believes may be or, claim to be, owners of the property so far as the same can by reasonable diligence be ascertained, and if any such persons are infants, incompetents, inebriates or under any other disability, or their whereabouts or names unknown, it must be so stated;
(5) A statement of the sum of money estimated by the condemnor to be just compensation for the taking; and
(6) A statement as to whether the owner will be permitted to remove all or a specified portion of any timber, buildings, structures, permanent improvements, or fixtures situated on or affixed to the property.
(7) A statement as to such liens or other encumbrances as the condemnor is informed and believes are encumbrances upon the property and can by reasonable diligence be ascertained.
(8) A prayer that there be a determination of just compensation in accordance with the provisions of this Article.

The filing of the complaint shall be accompanied by the deposit to the use of the owner of the sum of money estimated by the condemnor to be just compensation for the taking. Upon the filing of the complaint and the deposit of said sum, summons shall be issued to each owner of the property. The summons, together with a copy of the complaint and notice of the deposit shall be served upon the person named therein in the manner provided for the service of process under the provisions of G.S. 1A-1, Rule 4. The condemnor may amend the complaint and may increase the amount of its deposit with the court at any time while the proceeding is pending, and the owner shall have the same rights of withdrawal of this additional amount as set forth in G.S. 40A-44 of this

Chapter. (1935, c. 470, ss. 4, 5; 1947, c. 781; 1971, c. 382, s. 1; 1981, c. 919, s. 1.)

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

(a) When a local public condemnor is acquiring property by condemnation for a purpose set out in G.S. 40A-3(b)(1), (4) or (7), or when a city is acquiring property for a purpose set out in G.S. 160A-311(1), (2), (3), (4), (6), or (7), or when a county is acquiring property for a purpose set out in G.S. 153A-274(1), (2) or (3), title to the property and the right to immediate possession shall vest pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41.

(b) When a local public condemnor is acquiring property by condemnation for purposes other than for the purposes listed in subsection (a) above, title to the property taken and the right to possession shall vest in the condemnor pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor:

(1) Upon the filing of an answer by the owner who requests only that there be a determination of just compensation and who does not challenge the authority of the condemnor to condemn the property; or

(2) Upon the failure of the owner to file an answer within the 120-day time period established by G.S. 40A-46; or

(3) Upon the disbursement of the deposit in accordance with the provisions of G.S. 40A-44.

(c) If the property is owned by a private condemnor, the vesting of title in the condemnor and the right to immediate possession of the property shall not become effective until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner, as set forth in G.S. 40A-5(b).

(d) If the answer raises any issues other than the issue of compensation, the issues so raised shall be determined under the provisions of G.S. 40A-47.

(e) The judge shall enter such orders in the cause as may be required to place the condemnor in possession.

(f) The provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor. (1981, c. 919, s. 1.)

CASE NOTES

"Reasonable Diligence". — In an inverse condemnation suit where plaintiff's advertisement sign was torn down by defendant city, plaintiff's allegation in the complaint that defendant city failed to exercise reasonable diligence to discover plaintiff's interest and that plaintiff's sign was prominently constructed upon the property creates an issue of fact as to whether defendant city exercised reasonable diligence. Schloss Outdoor Adv. Co. v. City of Charlotte, 50 N.C. App. 150, 272 S.E.2d 920 (1980), (decided under former § 160A-246).

§ 40A-43. Memorandum of action.

The condemnor, at the time of the filing of the complaint containing the declaration of taking and deposit of estimated compensation, shall record a memorandum of action with the register of deeds in all counties in which the land involved is located and said memorandum shall be recorded among the land records of said county. Upon the amending of any complaint affecting the property taken, the condemnor shall record a supplemental memorandum of action. The memorandum of action shall contain:

(1) The names of those persons who the condemnor is informed and believes to be or claim to be owners of the property and who are parties to said action;
(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof;
(3) A statement of the property taken for public use;
(4) The date of institution of said action, the county in which said action is pending, and such other reference thereto as may be necessary for the identification of said action. (1981, c. 919, s. 1.)

§ 40A-44. Disbursement of deposit.

Where there is no dispute as to title the person named in the complaint may apply to the court for disbursement of the money deposited in the court, or any part thereof, as full compensation, or as a credit against just compensation without prejudice to further proceedings in the cause to determine just compensation. Upon such application, the judge shall order that the money deposited be paid forthwith to the person entitled thereto in accordance with the application. Subject to the provisions of G.S. 40A-68 the judge shall have power to make such orders with respect to encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

No notice to the condemnor of the hearing upon the application for disbursement of deposit shall be necessary. (1981, c. 919, s. 1.)

§ 40A-45. Answer, reply and plat.

(a) Any person whose property has been taken by the condemnor by the filing of a complaint containing a declaration of taking, may within the time set forth in G.S. 40A-46 file an answer to the complaint. No answer shall be filed to the declaration of taking and notice of deposit. Said answer shall contain the following:

(1) Such admissions or denials of the allegations of the complaint as are appropriate;
(2) The names and addresses of the persons filing said answer, together with a statement as to their interest in the property taken;
(3) Such affirmative defenses or matters as are pertinent to the action; and
(4) A request that there be a determination of just compensation.

(b) A copy of the answer shall be served on the condemnor provided that failure to serve the answer shall not deprive the answer of its validity. The affirmative allegations of said answer shall be deemed denied. The condemnor may, however, file a reply within 30 days from receipt of a copy of this answer.

(c) The condemnor, within 90 days from the receipt of the answer shall file in the cause a plat of the property taken and such additional area as may be necessary to properly determine the compensation, and a copy thereof shall be mailed to the parties or their attorney; provided, however, the condemnor shall not be required to file a map or plat in less than six months from the date of the filing of the complaint. (1981, c. 919, s. 1.)

§ 40A-46. Time for filing answer; failure to answer.

Any person named in and served with a complaint containing a declaration of taking shall have 120 days from the date of service thereof to file answer. Failure to answer within said time shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner. Provided, however, at any time prior to the entry of the final judgment the judge may, for good cause shown and after notice to the condemnor extend the time for filing answer for 30 days. (1981, c. 919, s. 1.)

§ 40A-47. Determination of issues other than damages.

The judge, upon motion and 10 days' notice by either the condemnor or the owner, shall, either in or out of session, hear and determine any and all issues raised by the pleadings other than the issue of compensation, including, but not limited to, the condemnor's authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken. (1981, c. 919, s. 1.)

§ 40A-48. Appointment of commissioners.

(a) A request to the clerk for the appointment of commissioners to determine compensation for the taking may be made in the answer of the owner, or may be made by motion of either the owner or the condemnor within 60 days after the filing of the answer. After the determination of other issues as provided by G.S. 40A-47, the clerk shall appoint three competent, disinterested persons residing in the county to serve as commissioners. The commissioners shall be sworn and shall go upon the land to appraise the compensation for the property taken and report their findings to the court within a time certain. Each commissioner shall be a person who has no right, title, or interest in or to the property being condemned, is not related within the third degree to the owner or to the spouse of the owner, is not an officer, employee, or agent of the condemnor, and is disinterested in the rights of the parties in every way.

(b) The commissioners shall have the power to inspect the property, hold hearings, swear witnesses, and take evidence as they may, in their discretion, deem necessary, and shall file with the court a report of their determination of the damages sustained.

(c) The report of commissioners shall be in writing and in a form substantially as follows:

TO THE SUPERIOR COURT OF . . . . COUNTY

We, ... and . . . . Commissioners appointed by the Court to assess the compensation to be awarded to . . . ., the owner of property interest in certain land lying in . . . . County, North Carolina, which has been taken by the . . . . (condemnor), for public purposes, do hereby certify that we convened, and, having first been duly sworn, visited the premises, and took such evidence as was presented to us, and after taking into full consideration the quality and quantity of the land and all other facts which reasonably affect its fair market value at the time of the taking, we have determined the fair market value of the property taken to be the sum of $. . . . . . and the compensation for the damage to the remainder of the land of the owner by reason of the taking to be the sum of $. . . . . (if applicable). GIVEN under our hands, this the . . . . . . day of . . . ., 19 . . . . .

. . . . (SEAL)
. . . . (SEAL)
. . . . (SEAL)

(d) A copy of the report shall at the time of filing be mailed certified or registered mail by the clerk to each of the parties or to their counsel of record. Within 30 days after the mailing of the report, either the condemnor or the owner, may except thereto and demand a trial de novo by a jury as to the issue of compensation. Upon the receipt of such demand the action shall be placed on the civil issue docket of the superior court for trial de novo by a jury as to the issue of compensation, provided, that upon agreement of both parties trial by jury may be waived and the issue determined by the judge. The report of commissioners shall not be competent as evidence upon the trial of the issue of compensation in the superior court, nor shall evidence of the deposit by the condemnor into the court be competent upon the trial of the issue of compensation. If no exception to the report of commissioners is filed within the time prescribed, final judgment shall be entered by the judge upon a determination and finding by him that the report of commissioners plus interest computed in accordance with G.S. 40A-53 of this Chapter, awards to the property owners just compensation. In the event that the judge is of the opinion and, in his discretion, determines that the award does not provide just compensation, he shall set aside the award and order the case placed on the civil issue docket for determination of the issue of compensation by a jury. (1981, c. 919, s. 1.)

§ 40A-49. No request for commissioners.

After the determination of other issues as provided by G.S. 40A-47, if no request has been made for the appointment of commissioners within the time permitted by G.S. 40A-48(a), the cause shall be transferred to the civil issue docket for trial as to the issue of just compensation. (1981, c. 919, s. 1.)

§ 40A-50. Parties, orders; continuances.

The judge shall appoint an attorney to appear for and protect the rights of any party or parties in interest who are unknown, or whose residence is unknown and who has not appeared in the proceeding by an attorney or agent. The State Treasurer as custodian of the Escheat Fund shall be notified of the appointment of such an attorney. The judge shall appoint guardians ad litem for such parties as are infants, incompetents, or other parties who may be under a disability, and without general guardian, and the judge shall have the authority to make such additional parties as are necessary to the complete determination of the proceeding.

Upon his own motion, or upon motion of any of the parties the judge may, in his discretion, continue the cause until the project is completed or until such earlier time as, in the opinion of the judge, the effect of condemnation upon said property may be determined. The motion may be heard at a hearing pursuant to G.S. 40A-47 or upon the coming on of the cause for trial, and shall be granted upon a proper showing that the effect of condemnation upon the subject property cannot presently be determined. (1981, c. 919, s. 1.)

§ 40A-51. Remedy where no declaration of taking filed; recording memorandum of action.

(a) If property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed the owner of the property, may initiate an action to seek compensation for the taking. The action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later. The complaint shall be filed in the superior court and shall contain the following: the names and places of residence of all persons who are, or claim to be, owners of the property, so far as the same can by reasonable diligence be ascertained; if any persons are under a legal disability, it must be so stated; a statement as to any encumbrances on the property; the particular facts which constitute the taking together with the dates that they allegedly occurred, and; a description of the property taken. Upon the filing of said complaint summons shall issue and together with a copy of the complaint be served on the condemnor. The allegations of said complaint shall be deemed denied; however, the condemnor within 60 days of service summons and complaint may file answer thereto. If the taking is admitted by the condemnor, it shall, at the time of filing the answer, deposit with the court the estimated amount of compensation for the taking. Notice of the deposit shall be given to the owner. The owner may apply for disbursement of the deposit and disbursement shall be made in accordance with the applicable provisions of G.S. 40A-44. If a taking is admitted, the condemnor shall, within 90 days of the filing of the answer to the complaint, file a map or plat of the property taken. The procedure hereinbefore set out in this Article and in Article 4 shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation.

(b) The owner at the time of filing of the complaint shall record a memorandum of action with the register of deeds in all counties in which the property involved is located. The memorandum is to be recorded among the land records of the county. The memorandum of action shall contain:

(1) The names of those persons who the owner is informed and believes to be or claim to be owners of the property;

(2) A description of the entire tract or tracts affected by the alleged taking sufficient for the identification thereof;

(3) A statement of the property allegedly taken; and

(4) The date on which owner alleges the taking occurred, the date on which said action was instituted, the county in which it was instituted, and such other reference thereto as may be necessary for the identification of said action.

(c) Nothing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property. (1981, c. 919, s. 1.)

§ 40A-52. Measure of compensation.

The commissioners, jury or judge shall determine the issue of compensation in accordance with the provisions of Article 4 of this Chapter. (1981, c. 919, s. 1.)

§ 40A-53. Interest as a part of just compensation.

To the amount awarded as compensation by the commissioners or a jury or judge, the judge shall add interest at the rate of six percent (6%) per annum on said amount from the date of taking to the date of judgment. Interest shall not be allowed from the date of deposit on so much thereof as shall have been paid into court as provided in this Article. (1981, c. 919, s. 1.)

§ 40A-54. Final judgments.

Final judgments entered in actions instituted under the provisions of this Article shall contain a description of the land affected, together with a description of the property acquired by the condemnor and a copy of said judgment shall be certified to the register of deeds in each county in which the land or any part thereof lies and be recorded among the land records of said county. (1981, c. 919, s. 1.)

§ 40A-55. Payment of compensation.

If there are adverse and conflicting claimants to the deposit made into the court by the condemnor or the additional amount determined as just compensation, on which the judgment is entered in said action, the judge may direct the full amount determined to be paid into said court by the condemnor and may retain said cause for determination of who is entitled to said moneys. The judge may by further order in the cause direct to whom the same shall be paid and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made. (1981, c. 919, s. 1.)

§ 40A-56. Refund of deposit.

In the event the amount of the final judgment is less than the amount deposited by the condemnor pursuant to the provisions of this Article, the condemnor shall be entitled to recover the excess of the amount of the deposit over the amount of the final judgment and court costs incident thereto. In the event there are not sufficient funds on deposit to cover said excess, the condemnor shall be entitled to a judgment for said sum against the person or persons having received said deposit. (1981, c. 919, s. 1.)

§§ 40A-57 to 40A-61: Reserved for future codification purposes.

ARTICLE 4.

Just Compensation.

§ 40A-62. Application.

The principles set down in this Article shall govern the determination of compensation to be awarded to the owner by the condemnor for the taking of his property. (1981, c. 919, s. 1.)

§ 40A-63. In general.

The determination of the amount of compensation shall reflect the value of the property immediately prior to the filing of the petition under G.S. 40A-20 or the complaint under G.S. 40A-41 and except as provided in the following sections shall not reflect an increase or decrease due to the condemnation. The day of the filing of a petition or complaint shall be the date of valuation of the interest taken. (1981, c. 919, s. 1.)

§ 40A-64. Compensation for taking.

(a) Except as provided in subsection (b), the measure of compensation for a taking of property is its fair market value.

(b) If there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

(c) If the owner is to be allowed to remove any timber, building or other permanent improvement of fixtures from the property, the value thereof shall not be included in the compensation award, but the cost of removal shall be considered as an element to be compensated. (1981, c. 919, s. 1.)

CASE NOTES

Instruction as to Sentimental Value. — In an action in eminent domain, the judge properly advised the jury foreman that sentimental value should not be considered in determining the value of just compensation. Carolina Power & Light Co. v. Merritt, 50 N.C. App. 269, 273 S.E.2d 727, cert. denied, N.C. , 276 S.E.2d 914 (1981), (decided under former Chapter 40).

§ 40A-65. Effect of condemnation procedure on value.

(a) The value of the property taken, or of the entire tract if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by (i) the proposed improvement or project for which the property is taken; (ii) the reasonable likelihood that the property would be acquired for that improvement or project; or (iii) the condemnation proceeding in which the property is taken.

(b) If before completion the project is expanded or changed to require the taking of additional property, the fair market value of the additional property does not include a decrease in value before the date of valuation caused by any of the factors described in subsection (a), but does include an increase in value before the date on which it became reasonably likely that the expansion or change of the project would occur, if the increase is caused by any of the factors described in subsection (a).

(c) Notwithstanding subsections (a) and (b), a decrease in value before the date of valuation which is caused by physical deterioration of the property within the reasonable control of the property owner, and by his unjustified neglect, may be considered in determining value. (1981, c. 919, s. 1.)

§ 40A-66. Compensation to reflect project as planned.

(a) If there is a taking of less than the entire tract, the value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project including any work to be performed under an agreement between the parties.

(b) The value of the remainder, as of the date of valuation, shall reflect the time the damage or benefit caused by the proposed improvement or project will be actually realized. (1981, c. 919, s. 1.)

§ 40A-67. Entire tract.

For the purpose of determining compensation under this Article, all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract. (1981, c. 919, s. 1.)

§ 40A-68. Acquisition of property subject to lien.

Notwithstanding the provisions of an agreement, if any, relating to a lien encumbering the property:

(1) If there is a partial taking, the lienholder may share in the amount of compensation awarded only to the extent determined by the commissioners or by the jury or by the judge to be necessary to prevent an impairment of his security, and the lien shall continue upon the part of the property not taken as security for the unpaid portion of the indebtedness until it is paid; and

(2) Neither the condemnor nor owner is liable to the lienholder for any penalty for prepayment of the debt secured by the lien, and the

amount awarded by the judgment to the lienholder shall not include any penalty therefor. (1981, c. 919, s. 1.)

§ 40A-69. Property subject to life tenancy.

If the property taken is subject to a life tenancy, the commissioners, the jury, or the judge may include in the judgment a requirement that:

(1) The award be apportioned and distributed on the basis of the respective values of the interests of the life tenant and remainderman;
(2) The compensation be used to purchase comparable property to be held subject to the life tenancy;
(3) The compensation be held in trust and administered subject to the terms of the instrument that created the life tenancy; or
(4) Any other equitable arrangement be carried out. (1981, c. 919, s. 1.)

Chapter 41.

Estates.

Sec.
41-2.1. Right of survivorship in bank deposits created by written agreement.
41-2.3, 41-2.4. [Reserved.]
41-2.5. Tenancy by the entirety in mobile homes.
41-6.2. Doctrine of worthier title abolished.
41-9. [Repealed.]

§ 41-1. Fee tail converted into fee simple.

Legal Periodicals. — For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in White v. Lackey, 40 N.C. App. 353, 253 S.E.2d 13 (1979).

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.

Legal Periodicals. — For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

CASE NOTES

I. GENERAL CONSIDERATION.

Section Applies Only to Estates of Inheritance. —
This section which abolished the right of survivorship in joint tenancies in estates of inheritance, does not apply to a joint tenancy in a life estate where no estate of inheritance is involved. Dew v. Shockley, 36 N.C. App. 87, 243 S.E.2d 177, cert. denied, 295 N.C. 465, 246 S.E.2d 9 (1978).

Concurrent Life Estates Not Affected. — Concurrent life estates still stand untouched by this section, and the old feudal presumption in favor of joint tenancies with survivorship remains. Dew v. Shockley, 36 N.C. App. 87, 243 S.E.2d 177, cert. denied, 295 N.C. 465, 246 S.E.2d 9 (1978).

Stated in O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

(b) A deposit account established under subsection (a) of this section shall have the following incidents:

(1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.

(2) During the lifetime of both or all the parties, the deposit account shall be subject to their respective debts to the extent that each has contributed to the unwithdrawn account. In the event their respective contributions are not determined, the unwithdrawn fund shall be deemed owned by both or all equally.

(3) Upon the death of either or any party to the agreement, the survivor, or survivors, become the sole owner, or owners, of the entire unwithdrawn deposit, subject to the following claims listed below in subdivisions a. through e. upon that portion of the unwithdrawn deposit which would belong to the deceased had the unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of the deceased:

a. The allowance of the year's allowance to the surviving spouse of the deceased;
b. The funeral expenses of the deceased;
c. The cost of administering the estate of the deceased;
d. The claims of the creditors of the deceased; and
e. Governmental rights.

(4) Upon the death of one of the joint tenants provided herein the banking institution in which said joint deposit is held shall pay to the legal representative of the deceased, or to the clerk of the superior court if the amount is less than two thousand dollars ($2,000), the portion of the unwithdrawn deposit made subject to the claims and expenses as provided in subdivision (3) above, and may pay the remainder to the surviving joint tenant or joint tenants. Said legal representative shall hold the portion of said unwithdrawn deposit paid to him and not use the same for the payment of the claims and expenses as provided in subdivision (3) above unless and until all other personal assets of the estate have been exhausted, and shall then use so much thereof as may be necessary to pay said claims and expenses. Any part of said unwithdrawn deposit not used for the payment of said claims and expenses shall, upon the settlement of the estate, be paid to the surviving joint tenant or tenants.

(1977, c. 671, ss. 1, 2.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, in subdivision (3) of subsection (b), substituted "following claims listed below in subdivisions a through e upon" for "claims of the creditors of the deceased and to governmental rights in," "the withdrawn deposit then divided" for "said withdrawn deposit then divided," and "the deceased" for "said deceased," and added paragraphs a through e. In subdivision (4) of subsection (b), the amendment substituted "claims and expenses" for "claims of the creditors of the deceased and to governmental rights" in the first sentence, substituted "claims and expenses as provided in subdivision (3) above" for "claims of the creditors of the deceased or governmental rights" and "said claims and expenses" for "any remaining debts of the deceased or governmental claims" in the second sentence, and substituted "said claims and expenses" for "such debts or charges of administration of the deceased" in the third sentence.

Session Laws 1977, c. 671, s. 3, provides: "This act shall become effective July 1, 1977, and shall apply to accounts of person dying on or after said date."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (b) is set out.

CASE NOTES

A certificate of deposit did not itself constitute compliance with subsection (a) of this section since the certificate did not contain the signatures of the depositors and thus did not amount to a signed writing as contemplated by the statute. The provision of the certificate, "Payable to said depositor, or, if more than one, to either or any of said depositors or the survivors or survivor," absent any other evidence, was not dispositive as to the ownership of funds. The use of the conjunction "or" in the certificate did not establish the right of survivorship but merely created an agency for the one other than the depositor to withdraw funds, such agency terminating at depositor's death. O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

Nor Did Signature Card Signed by Depositors. — A signature card signed by depositors did not comply with this section where the card did not expressly provide for the right of survivorship in the certificate of deposit in that there was no indication in the space provided on the signature card that gave effect to the survivorship provision. O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

No Trust Created. — Where deceased opened a savings account and on the application form wrote, "Payable to Rose Z. Weaver, as survivor only," there was no trust created with right of survivorship, since there was no evidence of a transfer or assignment of a present beneficial interest but only the expression of a desire that plaintiff own the account at the death of the depositor. Kyle v. Groce, 50 N.C. App. 204, 272 S.E.2d 609 (1980).

Change of Joint Account. — Where plaintiff and his former wife executed a joint account agreement with right of survivorship pursuant to this section, the joint account could be changed only by the signatures of all the parties to the joint account agreement or by one party's withdrawing the complete account and opening a new account. This section does not permit only one of the joint tenants of the account in question to change it from the original agreement executed by both parties to the detriment of the other. Benfield v. First Fed. Sav. & Loan Ass'n, 44 N.C. App. 371, 261 S.E.2d 150 (1979).

Abstention by Bankruptcy Court. — In a bankruptcy action concerning the issue of rights of ownership in a joint bank account with rights of survivorship, the bankruptcy court refused to rule on the issue since it was clearly one of state law requiring state expertise and, thus, the issue was one of unsettled North Carolina law on which a court of that state should have made a ruling. Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

Applied in Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

Cited in Combs v. Eller, 30 N.C. App. 30, 226 S.E.2d 197 (1976); Moore v. Galloway, 35 N.C. App. 394, 241 S.E.2d 386 (1978); Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

§ 41-2.2. Joint ownership of corporate stock and investment securities.

CASE NOTES

Cited in O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

§§ 41-2.3, 41-2.4: Reserved for future codification purposes.

§ 41-2.5. Tenancy by the entirety in mobile homes.

(a) When a husband and wife become co-owners of a mobile home, in the absence of anything to the contrary appearing in the instrument of title, they become tenants by the entirety with all the incidents of an estate by the entirety in real property, including the right of survivorship in the case of death of either.

(b) For the purpose of this section it shall be immaterial whether the property at any particular time shall be classified for any purpose as either real or personal. The provisions of subsection (a) shall not limit or prohibit any other type of ownership otherwise authorized by law.

(c) For purposes of this section "mobile home" means a portable manufactured housing unit designed for transportation on its own chassis and placement on a temporary or semipermanent foundation having a measurement of over 32 feet in length and over eight feet in width. As used in this Article, "mobile home" also means a double-wide mobile home which is two or more portable manufactured housing units designed for transportation on their own chassis, which connect on site for placement on a temporary or semipermanent foundation having a measurement of over 32 feet in length and over eight feet in width.

(d) Nothing herein contained shall be construed to repeal or modify any of the provisions of Article 1 of Chapter 105 relating to the administration of the inheritance tax laws or any other provision of the law relating to inheritance taxes. (1981, c. 507, s. 1.)

Editor's Note. — Session Laws 1981, c. 507, s. 2, makes this act effective Sept. 1, 1981.

§ 41-4. Limitations on failure of issue.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

CASE NOTES

Purpose of Section. —

The purpose of this section is to save gifts over upon the contingency of someone's dying without issue if the contingency occurs after the death of the testator or after some estate or period subsequent to his death. White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976).

Rule When Will Is Ambiguous. —

In accord with original. See Moore v. Hunter, 46 N.C. App. 449, 265 S.E.2d 884 (1980).

The law favors early indefeasible, etc. —

In accord with original. See Moore v. Hunter, 46 N.C. App. 449, 265 S.E.2d 884 (1980).

The words that the gift over "shall be . . . a limitation to take effect when such person dies not having such heir or issue, or child . . . living at the time of his death, or born to him within ten lunar months thereafter" mean simply that the interest will be sustained and will pass in possession when and if the contingency, e.g., dying without issue, occurs, even if this event takes place after the death of the testator or grantor or after some intervening estate or period following his death. White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976).

The words, that the gift over "shall be . . . a limitation to take effect when such person dies not having such heir or issue, or child . . . living at the time of his death, or born to him within ten lunar months thereafter," do not mean that a determination of those persons who take the interest must necessarily wait until the event occurs. At what point in time those persons are determined remains a question of the testator's intent. White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976).

This section does not operate to postpone vesting of the reversion until the death of the life tenant without children because a reversion is not an estate created by limitation in a deed or will but is an estate created by operation of law. Atkins v. Burden, 31 N.C. App. 660, 230 S.E.2d 594 (1976), cert. denied, 291 N.C. 710, 232 S.E.2d 202 (1977).

§ 41-5. Unborn infant may take by deed or writing.

Legal Periodicals. — For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

CASE NOTES

Cited in Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980).

§ 41-6. "Heirs" construed to be "children" in certain limitations.

Legal Periodicals. — For article, "The Rule In Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 41-6.1. Meaning of "next of kin."

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 41-6.2. Doctrine of worthier title abolished.

(a) The law of this State does not include: (i) the common-law rule of worthier title that a grantor or testator cannot convey or devise an interest to his own heirs, or (ii) a presumption or rule of interpretation that a grantor or testator does not intend, by a grant, devise or bequest to his own heirs or next of kin, to transfer an interest to them. The meaning of a grant, devise or bequest of a legal or equitable interest to a grantor's or testator's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of grants or wills.

(b) Subdivision (a)(i) of this section shall apply to all revocable trusts in existence as of February 26, 1979 and to all instruments, including revocable trusts, becoming effective after February 26, 1979, and subdivision (a)(ii) of this section shall apply to all instruments in existence as of February 26, 1979 and to all instruments becoming effective after February 26, 1979. If the application of this section to any instrument is held invalid, its application to other instruments to which it may validly be applied shall not be affected thereby. (1979, c. 88, s. 1.)

§ 41-9: Repealed by Session Laws 1979, c. 180, s. 2, effective October 1, 1979.

Cross References. — For present provisions as to spendthrift trusts, see § 36A-115.

Editor's Note. — Session Laws 1979, c. 180, s. 2, provides that this section is repealed, except as to wills or deeds executed prior to October 1, 1979.

§ 41-10. Titles quieted.

Legal Periodicals. — For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in McRorie v. Query, 32 N.C. App. 311, 232 S.E.2d 312 (1977); Heritage Communities of N.C., Inc. v. Powers, Inc., 49 N.C. App. 651, 272 S.E.2d 399 (1980).

§ 41-10.1. Trying title to land where State claims interest.

CASE NOTES

Where the defendant city was already in possession of the disputed property at the time of plaintiff's action, the action was in the nature of ejectment and merely an action to try title. Costner v. City of Greensboro, 37 N.C. App. 563, 246 S.E.2d 552 (1978).

§ 41-11. Sale, lease or mortgage in case of remainders.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

CASE NOTES

I. GENERAL CONSIDERATION.

Purpose of Section. — The purpose of this section is not to obtain predictive declarations of future rights of the parties, inter se, but rather to promote the interest of all the parties by allowing the sale of desirable land free from restrictions imposed by the presence of uncertainties as to whom the land will ultimately belong. Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976).

Cited in Stoney v. MacDougall, 31 N.C. App. 678, 230 S.E.2d 592 (1976).

III. SALE AND REINVESTMENT.

Section Contemplates Reinvestment. — This section contemplates that the proceeds of the sale, less expenses and perhaps the present worth of the life tenant's share, will be reinvested, either in purchasing or in improving real estate. Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

CASE NOTES

Quoted in Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976).

§ 41-12. Sales or mortgages of contingent remainders validated.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

Chapter 42.

Landlord and Tenant.

Article 2.

Agricultural Tenancies.

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Ejectment of Residential Tenants.

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42-37.2. Remedies.
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Residential Rental Agreements.

42-38. Application.
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42-43. Tenant to maintain dwelling unit.
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42-45 to 42-49. [Reserved.]

Article 6.

Tenant Security Deposit Act.

42-50. Deposits from the tenant.
42-51. Permitted uses of the deposit.
42-52. Landlord's obligations.
42-53. Pet deposits.
42-54. Transfer of dwelling units.
42-55. Remedies.
42-56. Application of Article.

ARTICLE 1.

General Provisions.

§ 42-3. Term forfeited for nonpayment of rent.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Applied in Green v. Lybrand, 39 N.C. App. 56, 249 S.E.2d 443 (1978).

§ 42-4. Recovery for use and occupation.

CASE NOTES

Applied in Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976).

§ 42-13. Wrongful surrender to other than landlord misdemeanor.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-14. Notice to quit in certain tenancies.

CASE NOTES

Cited in Goler Metropolitan Apts., Inc. v. Williams, 43 N.C. App. 648, 260 S.E.2d 146 (1979).

ARTICLE 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For an article entitled, "Estate Planning for Farmers after the Reform Act of 1976," see 14 Wake Forest L. Rev. 577 (1978).

§ 42-15.1. Landlord's lien on crop insurance for rents, advances, etc.; enforcement.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-16. Rights of tenants.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-22. Unlawful seizure by landlord or removal by tenant misdemeanor.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-23. Terms of agricultural tenancies in certain counties.

All agricultural leases and contracts hereafter made between landlord and tenant for a period of one year or from year to year, whether such tenant pay a specified rental or share in the crops grown, such year shall be from December first to December first, and such period of time shall constitute a year for agricultural tenancies in lieu of the law and custom heretofore prevailing, namely from January first to January first. In all cases of such tenancies a notice to quit of one month as provided in G.S. 42-14 shall be applicable. If on account of illness or any other good cause, the tenant is unable to harvest all the crops grown on lands leased by him for any year prior to the termination of his lease contract on December first, he shall have a right to return to the premises vacated by him at any time prior to December thirty-first of said year, for the purpose only of harvesting and dividing the remaining crops so ungathered. But he shall have no right to use the houses or outbuildings or that part of the lands from which the crops have been harvested prior to the termination of the tenant year, as defined in this section.

This section shall only apply to the counties of Alamance, Anson, Ashe, Bladen, Brunswick, Columbus, Craven, Cumberland, Duplin, Edgecombe, Gaston, Greene, Hoke, Jones, Lenoir, Lincoln, Montgomery, Onslow, Pender, Person, Pitt, Robeson, Sampson, Wayne and Yadkin. (Pub. Loc. 1929, c. 40; Pub. Loc. 1935, c. 288; Pub. Loc. 1937, cc. 96, 600; Pub. Loc. 1941, c. 41; 1943, c. 68; 1945, c. 700; 1949, c. 136; 1953, c. 499, s. 1; 1955, c. 136; 1959, c. 1076; 1981, c. 97. s. 1.)

Effect of Amendments. — The 1981 amendment deleted Halifax in the list of counties in the second paragraph. Session Laws 1981, c. 97, s. 2, provides: "This act is effective upon ratification and applies to agricultural leases and contracts made or renewed on or after that date." The act was ratified March 16, 1981.

§§ 42-25.1 to 42-25.5: Reserved for future codification purposes.

Article 2A.

Ejectment of Residential Tenants.

§ 42-25.6. Manner of ejectment of residential tenants.

It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 of this Chapter. (1981, c. 566, s. 1.)

Editor's Note. — Session Laws 1981, c. 566, s. 3, makes the act effective Oct. 1, 1981.

§ 42-25.7. Distress and distraint not permitted.

It is the public policy of the State of North Carolina that distress and distraint are prohibited and that landlords of residential rental property shall have security interests or liens on the personal property of their residential tenants only in accordance with G.S. 44A-2(e). (1981, c. 566, s. 1.)

§ 42-25.8. Contrary lease provisions.

Any lease or contract provision contrary to this Article shall be void as against public policy. (1981, c. 566, s. 1.)

§ 42-25.9. Remedies.

(a) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or damages for emotional distress.

(b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 44A-2(e), the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress.

(c) The remedies created by this section are supplementary to all existing common-law and statutory rights and remedies. (1981, c. 566, s. 1.)

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

I. APPLICATION AND SCOPE.

Summary Ejectment of Tenants at Will. — When a landlord tells tenants at will to vacate the premises, their tenancy instantly expires, regardless of whether they have defaulted on the rent, and the landlord has the right to bring an immediate action for summary ejectment under this section. Stout v. Crutchfield, 21 N.C. App. 387, 204 S.E.2d 541 (1974).

The above paragraph should be substituted for the paragraph catchlined "Tenants at Will Have Right of Action for Ejectment upon Eviction" on page 486 in the bound volume. — Ed. note.

Cited in Couch v. ADC Realty Corp., 48 N.C. App. 108, 268 S.E.2d 237 (1980).

II. HOLDING OVER.

Constitutionality. —

The summary ejectment procedure as set out in subdivision (1) of this section and § 42-32 is not unconstitutional in that subdivision (1) provides no defense whatsoever to a residential tenant of commercially owned property who holds over, after being given notice that the term has expired or that the owner desires possession. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Subdivision (1) of this section provides no defense because none exists. Once the estate of the lessee expires, the lessor, by virtue of his superior title, may resume possession by following proper procedures. Defendant's right to possession is protected by virtue of §§ 42-35 and

42-36, which provide a remedy to the tenant if he is evicted, but later restored to possession. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

§ 42-28. Summons issued by clerk.

When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place (not to exceed five days from the issuing of the summons, without the consent of the plaintiff) to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed one thousand dollars ($1,000), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C. S., s. 2367; 1971, c. 533, s. 4; 1973, c. 1267, s. 4; 1979, c. 144, s. 4; 1981, c. 555, s. 4.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, substituted "eight hundred dollars ($800.00)" for "five hundred dollars ($500.00)" in the second sentence.

The 1981 amendment, effective Oct. 1, 1981, substituted "one thousand dollars ($1,000)" for "eight hundred dollars ($800.00)" in the second sentence.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-30. Judgment by confession or where plaintiff has proved case.

The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the plaintiff proves his case by a preponderance of the evidence, or the defendant admits the allegations of the complaint, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding one thousand dollars ($1,000), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C. S., s. 2369; 1971, c. 533, s. 5; 1973, c. 10; c. 1267, s. 4; 1979, c. 144, s. 5; 1981, c. 555, s. 5.)

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, substituted "eight hundred dollars ($800.00)" for "five hundred dollars ($500.00)" near the end of the section.

The 1981 amendment, effective Oct. 1, 1981, substituted "one thousand dollars ($1,000)" for "eight hundred dollars ($800.00)" near the end of the section.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Applied in Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980).

§ 42-32. Damages assessed to trial.

On appeal to the district court, the jury trying issues joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to the amount of rent in arrears, or which may have accrued, to the time of trial in the district court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (1868-9, c. 156, s. 28; Code, s. 1775; Rev., s. 2006; C. S., s. 2371; 1945, c. 796; 1971, c. 533, s. 7; 1979, c. 820, s. 7.)

Effect of Amendments. — The 1979 amendment, effective Sept. 1, 1979, deleted "double" preceding "the amount of rent in arrears" near the end of the first sentence.

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

CASE NOTES

Constitutionality. — Since there are no jury trials in magistrates' courts, the rent bond of § 42-34(b), the penalty of the present section and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under § 1A-1, Rule 62(a), are obstacles to effective appeal to the district court which effectively deprive the indigent tenant of access to jury trial without justification or rationale adequate to survive a constitutional test. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Taken together, §§ 1A-1, Rule 62(a), 42-34(b), and this section deny access to jury trial and place an unconstitutionally discriminatory burden upon less-than-affluent tenant-appellants in summary ejectment cases, in violation of the equal protection clause of the United States Constitution. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

This section, insofar as it allows damages, and § 42-34(b) insofar as it requires an undertaking and § 1A-1, Rule 62(a) insofar as it excepts summary ejectment cases from an automatic ten-day stay of execution of judgment, are unconstitutional and unenforceable. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

This section and §§ 42-34(b) and 1A-1, Rule 62(a) are unconstitutional in that they (a) arbitrarily, irrationally and unequally burden and foreclose the right of tenants in summary ejectment to trial by jury and to a meaningful appeal and preclude such tenants from fairly pursuing their constitutional rights in the state courts, and (b) violate the Equal Protection Clause of the Fourteenth Amendment because of the discrimination they create between tenant-appellants on the one hand and civil appellants generally on the other hand. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

The summary ejectment procedure as set out in § 42-26(1) and this section, is not unconstitutional in that § 42-26(1) provides no defense whatsoever to a residential tenant of commercially owned property who holds over, after being given notice that the term has expired or that the owner desires possession. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Double Rent Penalty of Former Statute Had Effect of Blocking Appeals by Poor Tenants. — Historically the double rent penalty and the other sanctions of the North Carolina statutes and rules relating to summary ejectment have the effect of blocking almost all appeals, meritorious and otherwise, by poor tenants while not deterring frivolous appeals by those who can afford the cost. Screening frivolous appeals is not a purpose reasonably related to the double rent penalty. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

The combined effect of the bond of § 42-34(b), the double rent penalty provided for in this section prior to the 1979 amendment and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under § 1A-1, Rule 62(a) is to make appeals difficult for all tenants and impossible for indigent tenants and to deprive indigent tenants of the right of trial by jury. These statutes and Rule 62(a) in effect extinguish the rights of indigent tenants to any meaningful appeal. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 42-33. Rent and costs tendered by tenant.

CASE NOTES

Actions Subject to Statute. — The wording of this section makes clear that it applies not just to summary ejectment actions, but to any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent. Green v. Lybrand, 39 N.C. App. 56, 249 S.E.2d 443 (1978).

When Section Not Applicable. — This section has no application if the terms of the lease provide the lessor can terminate the lease upon nonpayment of the rent. Couch v. ADC Realty Corp., 48 N.C. App. 108, 268 S.E.2d 237 (1980).

Forfeiture by Breach of Covenant. — Unless there is an express provision for a forfeiture in a lease, a breach of a covenant does not work a forfeiture. Couch v. ADC Realty Corp., 48 N.C. App. 108, 268 S.E.2d 237 (1980).

Applied in Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979).

§ 42-34. Undertaking on appeal and order staying execution.

(a) Upon appeal to the district court, either party may demand that the case be tried at the first session of the court after the appeal is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it.

(b) It shall be sufficient to stay execution of a judgment for ejectment that the defendant appellant sign an undertaking that he will pay into the office of the clerk of superior court the amount of the contract rent as it becomes due periodically after the judgment was entered and, where applicable, comply with subdivision (c) below. Any magistrate, clerk, or district court judge shall order stay of execution upon such undertaking. If either party disputes the amount of the payment or the due date in such undertaking, the aggrieved party may move for modification of the terms of the undertaking before the clerk of superior court or the district court. Upon such motion and upon notice to all interested parties, the clerk or court shall hold a hearing and determine what modifications, if any, are appropriate.

(c) In an ejectment action based upon alleged nonpayment of rent where the judgment is entered more than five working days before the day when the next rent will be due under the lease, the appellant shall make an additional undertaking to stay execution pending appeal. Such additional undertaking shall be the payment of the prorated rent for the days between the day that the judgment was entered and the next day when the rent will be due under the lease. Notwithstanding, such additional undertaking shall not be required of an indigent appellant who prosecutes his appeal with an in forma pauperis affidavit that meets the requirements of G.S. 1-288.

(d) The undertaking by the appellant and the order staying execution may be substantially in the following form:

"State of North Carolina,
"County of . . . .
". . . . . , Plaintiff
vs.
". . . . . , Defendant

Bond to
Stay Execution
On Appeal to
District Court

"Now comes the defendant in the above entitled action and respectfully shows the court that judgment for summary ejectment was entered against the defendant and for the plaintiff on the . . . . day of . . . . . ., 19. . ., by the Magistrate. Defendant has appealed the judgment to the District Court.

"Pursuant to the terms of the lease between plaintiff and defendant, defendant is obligated to pay rent in the amount of $. . . . . . per . . . ., due on the . . . . . day of each . . . . ..

"Where an additional undertaking is required by G.S. 42-34(c), the defendant hereby tenders $. . . . . to the Court as required.

"Defendant hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid terms of the lease and moves the Court to stay execution on the judgment for summary ejectment until this matter is heard on appeal by the District Court.

"This the . . . . day of . . . ., 19. . . ..

. . . .
Defendant

"Upon execution of the above bond, execution on said judgment for summary ejectment is hereby stayed until the action is heard on appeal in the District Court. If defendant fails to make any rental payment to the clerk's office within five days of the due date, upon application of the plaintiff, the stay of execution shall dissolve and the sheriff may dispossess the defendant.

"This . . . . day of . . . ., 19. . . ..

. . . .
Assistant Clerk of Superior Court."

(e) Upon application of the plaintiff, the clerk of superior court shall pay to the plaintiff any amount of the rental payments paid by the defendant into the clerk's office which are not claimed by the defendant in any pleadings.

(f) If the defendant fails to make a payment within five days of the due date according to the undertaking and order staying execution, the clerk, upon application of the plaintiff, shall issue execution on the judgment for possession.

(g) When it appears by stipulation executed by all of the parties or by final order of the court that the appeal has been resolved, the clerk of court shall disburse any accrued moneys of the undertaking remaining in the clerk's office according to the terms of the stipulation or order. (1868-9, c. 156, s. 25; 1883, c. 316; Code, s. 1772; Rev., s. 2008; C. S., s. 2373; 1921, c. 90; Ex. Sess. 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159; 1971, c. 533, s. 8; 1979, c. 820, ss. 1-6.)

Effect of Amendments. — The 1979 amendment, effective Sept. 1, 1979, rewrote subsection (b) and added subsections (c) through (g).

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

CASE NOTES

Constitutionality. — Since there are no jury trials in magistrates' courts, the bond of subsection (b) of this section, the penalty of § 42-32, and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under § 1A-1, Rule 62(a), are obstacles to effective appeal to the district court which effectively deprive the indigent tenant of access to jury trial without justification or rationale adequate to survive a constitutional test. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Taken together, §§ 1A-1, Rule 62(a) and 42-32 and subsection (b) of this section deny access to jury trial and place an unconstitutionally discriminatory burden upon less-than-affluent tenant-appellants in summary ejectment cases, in violation of the Equal Protection Clause of the United States Constitution. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Section 42-32, insofar as it allows additional damages, and subsection (b) of this section insofar as it requires an undertaking, and

§ 1A-1, Rule 62(a) insofar as it excepts summary ejectment cases from an automatic ten-day stay of execution of judgment, are unconstitutional and unenforceable. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Sections 42-32 and 1A-1, Rule 62(a) and subsection (b) of this section are unconstititional in that they (a) arbitrarily, irrationally and unequally burden and foreclose the right of tenants in summary ejectment to trial by jury and to a meaningful appeal and preclude such tenants from fairly pursuing their constitutional rights in the state courts, and (b) violate the Equal Protection Clause of the Fourteenth Amendment because of the discrimination they create between tenant-appellants on the one hand and civil appellants generally on the other hand. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

The bond requirement of subsection (b) is discriminatory; such a bond is not required of appellants in any other case. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Former Statute's Requirement of Three Months' Rent Irrational and Unnecessary. — To require three months' rent to stay execution in advance of an appeal which might last an indefinite time is irrational and is unnecessary to accomplish any reasonable state purpose. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Bond requirement of subsection (b) does not serve any legitimate state interest. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Three-Month Rent Bond of Former Statute Had Effect of Blocking Appeals by Poor Tenants. — The combined effect of the three-month rent bond which prior to 1979 was required by subsection (b) of this section, the double rent penalty formerly provided for in § 42-32 and the entitlement of the landlord to immediate execution on a judgment of summary ejectment under § 1A-1, Rule 62(a) is to make appeals difficult for all tenants and impossible for indigent tenants and to deprive indigent tenants of the right of trial by jury. These statutes and Rule 62(a) in effect extinguish the rights of indigent tenants to any meaningful appeal. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 42-35. Restitution of tenant, if case quashed, etc., on appeal.

CASE NOTES

Cited in Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

§ 42-36. Damages to tenant for dispossession, if proceedings quashed, etc.

CASE NOTES

Eviction of Tenant in Federally Subsidized Low-Income Housing Project. — A tenant in a federally subsidized low-income housing project has an "entitlement" to continued occupancy and cannot be evicted until certain procedural protections have been afforded him. Where a tenant, upon eviction was not afforded Housing and Urban Development eviction procedures, tenant's tenancy continued as a month-to-month tenancy without interruption. Pursuant to this section, the damages of the tenant which proximately flowed from her wrongful eviction were the loss of her security deposit, her moving expenses, the cost of transfer and storage of her furniture, and the loss of her entitlement to federal rental subsidy payments from the times of her eviction until she obtained a reversal of the eviction order. Goler Metropolitan Apts., Inc. v. Williams, 43 N.C. App. 648, 260 S.E.2d 146 (1979).

Cited in Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

ARTICLE 4A.

Retaliatory Eviction.

§ 42-37.1. Defense of retaliatory eviction.

(a) It is the public policy of the State of North Carolina to protect tenants and other persons whose residence in the household is explicitly or implicitly known to the landlord, who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law:

(1) A good faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair under G.S. 42-42;

(2) A good faith complaint to a government agency about a landlord's alleged violation of any health or safety law, or any regulation, code, ordinance, or State or federal law that regulates premises used for dwelling purposes;

(3) A government authority's issuance of a formal complaint to a landlord concerning premises rented by a tenant;

(4) A good faith attempt to exercise, secure or enforce any rights existing under a valid lease or rental agreement or under State or federal law; or

(5) A good faith attempt to organize, join, or become otherwise involved with, any organization promoting or enforcing tenants' rights.

(b) In an action for summary ejectment pursuant to G.S. 42-26, a tenant may raise the affirmative defense of retaliatory eviction and may present evidence that the landlord's action is substantially in response to the occurrence within 12 months of the filing of such action of one or more of the protected acts described in subsection (a) of this section.

(c) Notwithstanding subsections (a) and (b) of this section, a landlord may prevail in an action for summary ejectment if:

(1) The tenant breached the covenant to pay rent or any other substantial covenant of the lease for which the tenant may be evicted, and such breach is the reason for the eviction; or

(2) In a case of a tenancy for a definite period of time where the tenant has no option to renew the lease, the tenant holds over after expiration of the term; or

(3) The violation of G.S. 42-42 complained of was caused primarily by the willful or negligent conduct of the tenant, member of the tenant's household, or their guests or invitees; or

(4) Compliance with the applicable building or housing code requires demolition or major alteration or remodeling that cannot be accomplished without completely displacing the tenant's household; or

(5) The landlord seeks to recover possession on the basis of a good faith notice to quit the premises, which notice was delivered prior to the occurrence of any of the activities protected by subsections (a) and (b) of this section; or

(6) The landlord seeks in good faith to recover possession at the end of the tenant's term for use as the landlord's own abode, to demolish or make major alterations or remodeling of the dwelling unit in a manner that requires the complete displacement of the tenant's household, or to terminate for at least six months the use of the property as a rental dwelling unit. (1979, c. 807.)

§ 42-37.2. Remedies.

(a) If the court finds that an ejectment action is retaliatory, as defined by this Article, it shall deny the request for ejectment; provided, that a dismissal of the request for ejectment shall not prevent the landlord from receiving payments for rent due or any other appropriate judgment.

(b) The rights and remedies created by this Article are supplementary to all existing common law and statutory rights and remedies. (1979, c. 807.)

§ 42-37.3. Waiver.

Any waiver by a tenant or a member of his household of the rights and remedies created by this Article is void as contrary to public policy. (1979, c. 807.)

ARTICLE 5.

Residential Rental Agreements.

§ 42-38. Application.

This Article determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State. (1977, c. 770, s. 1.)

Editor's Note. — Session Laws 1977, c. 770, s. 3, provides: "This act shall become effective on October 1, 1977, and applies to rental agreements entered into, extended, or renewed automatically or by the parties after October 1, 1977."

Legal Periodicals. — For an article entitled, "North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability In Landlord — Tenant Relations," see 56 N.C.L. Rev. 785 (1978).

For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

§ 42-39. Exclusions.

(a) The provisions of this Article shall not apply to transient occupancy in a hotel, motel, or similar lodging subject to regulation by the Commission for Health Services.

(b) Nothing in this Article shall apply to any dwelling furnished without charge or rent. (1973, c. 476, s. 128; 1977, c. 770, ss. 1, 2.)

Editor's Note. — Pursuant to Session Laws 1973, c. 476, s. 128, "Commission for Health Services" has been substituted for "State Board of Health" in this section as enacted by Session Laws 1977, c. 770.

§ 42-40. Definitions.

For the purpose of this Article, the following definitions shall apply:

(1) "Action" includes recoupment, counterclaim, defense, setoff, and any other proceeding including an action for possession.

(2) "Premises" means a dwelling unit, including mobile homes or mobile home spaces, and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities normally held out for the use of residental tenants who are using the dwelling unit as their primary residence.

(3) "Landlord" means any owner and any rental managment company, rental agency, or any other person having the actual or apparent

authority of an agent to perform the duties imposed by this Article. (1977, c. 770, s. 1; 1979, c. 880, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective Oct. 1, 1979, inserted "including mobile homes or mobile home spaces" in subdivision (2) and added subdivision (3).

§ 42-41. Mutuality of obligations.

The tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42-43 and the landlord's obligation to comply with G.S. 42-42(a) shall be mutually dependent. (1977, c. 770, s. 1.)

§ 42-42. Landlord to provide fit premises.

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in safe condition; and

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article. (1977, c. 770, s. 1.)

§ 42-43. Tenant to maintain dwelling unit.

(a) The tenant shall:

(1) Keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses;

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises or knowingly permit any person to do so;

(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes; and

(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the

landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations. (1977, c. 770, s. 1.)

§ 42-44. General remedies and limitations.

(a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.

(b) Repealed by Session Laws 1979, c. 820, s. 8.

(c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.

(d) A violation of this Article shall not constitute negligence per se. (1977, c. 770, s. 1; 1979, c. 820, s. 8.)

Effect of Amendments. — The 1979 amendment, effective Sept. 1, 1979, deleted subsection (b), which read: "No party shall be entitled to double damages in actions brought under this Article 5," and deleted the former second sentence of subsection (c), which provided that the tenant should be entitled to remain in possession of the premises pending appeal by continuing to pay the contract rent, subject to the provisions of G.S. 42-34(b).

§§ 42-45 to 42-49: Reserved for future codification purposes.

ARTICLE 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant.

Security deposits from the tenant in residential dwelling units shall be deposited in a trust account with a licensed and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, furnish a bond from an insurance company licensed to do business in North Carolina. The security deposits from the tenant may be held in a trust account outside of the State of North Carolina only if the landlord provides the tenant with an adequate bond in the amount of said deposits. The landlord or his agent shall notify the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond. (1977, c. 914, s. 1.)

Editor's Note. — Session Laws 1977, c. 914, s. 3, makes this Article effective Oct. 1, 1977.

Legal Periodicals. — For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

§ 42-51. Permitted uses of the deposit.

Security deposits for residential dwelling units shall be permitted only for the tenant's possible nonpayment of rent, damage to the premises, nonfulfillment of rental period, any unpaid bills which become a lien against the demised property due to the tenant's occupancy, costs of re-renting the premises after breach by the tenant, or court costs in connection with terminating a tenancy. Such security deposit shall not exceed an amount equal to two weeks' rent if a tenancy is week to week, one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month. These deposits must be fully accounted for by the landlord as set forth in G.S. 42-52. (1977, c. 914, s. 1.)

§ 42-52. Landlord's obligations.

Upon termination of the tenancy, money held by the landlord as security may be applied as permitted in G.S. 42-51 or, if not so applied, shall be refunded to the tenant. In either case the landlord in writing shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession by the tenant. If the tenant's address is unknown the landlord shall apply the deposit as permitted in G.S. 42-51 after a period of 30 days and the landlord shall hold the balance of the deposit for collection by the tenant for at least six months. The landlord may not withhold as damages part of the security deposit for conditions that are due to normal wear and tear nor may the landlord retain an amount from the security deposit which exceeds his actual damages. (1977, c. 914, s. 1.)

§ 42-53. Pet deposits.

Notwithstanding the provisions of this section, the landlord may charge a reasonable, nonrefundable fee for pets kept by the tenant on the premises. (1977, c. 914, s. 1.)

§ 42-54. Transfer of dwelling units.

Upon termination of the landlord's interest in the dwelling unit in question, whether by sale, assignment, death, appointment of receiver or otherwise, the landlord or his agent shall, within 30 days, do one of the following acts, either of which shall relieve him of further liability with respect to such payment or deposit:

(1) Transfer the portion of such payment or deposit remaining after any lawful deductions made under this section to the landlord's successor in interest and thereafter notify the tenant by mail of such transfer and of the transferee's name and address; or

(2) Return the portion of such payment or deposit remaining after any lawful deductions made under this section to the tenant. (1977, c. 914, s. 1.)

§ 42-55. Remedies.

If the landlord of the landlord's success or in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, the court may, in its discretion, allow a reasonable attorney's fee to the duly licensed attorney representing the prevailing party, such attorney's fee to be taxed as part of the cost of court. (1977, c. 914, s. 1.)

§ 42-56. Application of Article.

The provisions of this Article shall apply to all persons, firms, or corporations engaged in the business of renting or managing residential dwelling units, excluding single rooms, on a weekly, monthly or annual basis. (1977, c. 914, s. 2.)

Chapter 43.

Land Registration.

Article 2.

Officers and Fees.

Sec.

43-5. Fees of officers.

Article 3.

Procedure for Registration.

43-8. Petition filed; contents; State to be named as respondent; service on State.

43-12. Effect of decree; approval of judge.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Legal Periodicals. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

ARTICLE 2.

Officers and Fees.

§ 43-5. Fees of officers.

The examiner hereinbefore provided for shall receive, as may be allowed by the clerk, a minimum fee of five dollars ($5.00) for such examination of each title of property assessed upon the tax books at the amount of five thousand dollars ($5,000) or less; for each additional thousand dollars ($1,000) of assessed value of property so examined he shall receive fifty cents (50¢); for examination outside of the county he shall receive a reasonable allowance. There shall be allowed to the register of deeds for copying the plot upon registration of titles book two dollars ($2.00) for the first page and one dollar ($1.00) for each succeeding page; for copying or recording new certificates under this Chapter, two dollars ($2.00) for the first page and one dollar ($1.00) for each succeeding page; for issuing the certificate and new certificates under this Chapter, fifty cents (50¢) for each; for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for, fifty cents (50¢) for each entry. The county or other surveyor employed under the provisions of this Chapter shall not be allowed to charge more than forty cents (40¢) per hour for his time actually employed in making the survey and the map, except by agreement with the petitioner, but he shall be allowed a minimum fee of two dollars ($2.00).

There shall be no other fees allowed of any nature except as herein provided, and the bond of the register, clerk and sheriff shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this Chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30; C. S., s. 2381; 1971, c. 1185, s. 1; 1977, c. 774.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, in the first paragraph, substituted "two dollars ($2.00) for the first page and one dollar ($1.00) for each succeeding page; for copying or recording new certificates under this Chapter, two dollars ($2.00) for the first page and one dollar ($1.00) for each succeeding page" for "one dollar ($1.00)" and "fifty cents (50¢) for each entry" for "a total of twenty-five cents (25¢) for the entry or entries connected with one transaction" in the second sentence and substituted "but he shall be allowed a minimum fee of two dollars ($2.00)" for "Provided, however, that a minimum fee of two dollars ($2.00) in any case may be allowed" at the end of the third sentence.

ARTICLE 3.

Procedure for Registration.

§ 43-6. Who may institute proceedings.

CASE NOTES

Applied in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 43-8. Petition filed; contents; State to be named as respondent; service on State.

Suit for registration of title shall be begun by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens or not. Infants and other persons under disability may sue by guardian or trustee, as the case may be, and corporations as in other cases now provided by law; but the person in whose behalf the petition is made shall always be named as petitioner. The petition shall be signed and sworn to by each petitioner, and shall contain a full description of the land to be registered as hereinafter provided, together with a plot of same by metes and bounds, corners to be marked by permanent markers of iron, stone or cement; it shall show when, how and from whom it was acquired, and whether or not it is now occupied, and if so, by whom; and it shall give an account of all known liens, interests, equities and claims, adverse or otherwise, vested or contingent, upon such land. Full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including adjoining owners and occupants, shall be given. If any person shall be unable to state the metes and bounds, the clerk may order a preliminary survey.

Except when the State of North Carolina is the petitioner, all special proceedings filed pursuant to this Article shall name the State of North Carolina as a respondent to the action. Service of process upon the State shall be made in accordance with G.S. 1A-1, Rule 4(j)(3). (1913, c. 90, s. 5; C. S., s. 2384; 1979, c. 73, s. 1.)

Effect of Amendments. — The 1979 amendment added the second paragraph.

§ 43-10. Notice of petition published.

Legal Periodicals. — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

Sufficiency of Short Form of Description. — Where the notice is required to contain a short form of description of the property, it is sufficient if it clearly calls the attention of adjoining owners or others interested to the particular property intended and need not contain all of the elements of a full description. Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Reference to County Public Registry for Description Insufficient. — Where notice published in county newspaper under this section simply says where in the county public registry a description of the land in question may be found, the notice by publication is inadequate to give the notice required by statute. Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Cited in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 43-11. Hearing and decree.

CASE NOTES

Contested proceedings, etc. —

Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by subdivisions (a), (b), and (c) of this section; the same rules for proving title apply in these actions as in ejectment and other actions involving the establishment of land titles. Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

On a hearing before an examiner in a contested proceeding to register a land title under this chapter, the same rules for proving title apply as in actions of ejectment and other actions involving the establishment of land titles. Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 43-12. Effect of decree; approval of judge.

Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, "to whom it may concern"; and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this State of his or its right or title thereto. It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. Notwithstanding the provisions of G.S. 43-10, such decrees shall not be binding on and include the State of North Carolina or any of its agencies unless the State of North Carolina is made a party to the proceeding and notice of said proceeding and copy of petition, etc., are served upon the State of North Carolina as provided in this Chapter. Such decrees shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries. (1913, c. 90, s. 9; 1919, c. 82, s. 3; C. S., s. 2388; 1925, c. 263; 1979, c. 73, s. 2.)

Effect of Amendments. — The 1979 amendment rewrote the next-to-last sentence, which formerly read: "Such decrees shall not be binding on and include the State of North

Carolina or the State Board of Education unless notice of said proceeding and copy of petition, etc., as provided in this Chapter, are served on the Governor and on the State Board of Education severally and personally."

CASE NOTES

Quoted in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

ARTICLE 4.

Registration and Effect.

§ 43-17. New certificate issued, if original lost.

CASE NOTES

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

§ 43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.

CASE NOTES

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

§ 43-21. No right by adverse possession.

CASE NOTES

Cited in Board of Transp. v. Pelletier, 38 N.C. App. 533, 248 S.E.2d 413 (1978).

ARTICLE 5.

Adverse Claims and Corrections after Registration.

§ 43-26. Limitations.

Legal Periodicals. — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

ARTICLE 6.

Method of Transfer.

§ 43-38. Transfers probated; partitions; contracts.

CASE NOTES

Contract Subject to Statute of Frauds. — A partially executed contract to convey real estate is subject to the statute of frauds. Holt v. Holt, 47 N.C. App. 618, 267 S.E.2d 711 (1980).

Contract Not Subject to Statute of Frauds. — A fully executed contract to convey real estate is not subject to the statute of frauds. Holt v. Holt, 47 N.C. App. 618, 267 S.E.2d 711 (1980).

Chapter 44.

Liens.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

Sec.
44-51.8. Counties to which Article applies.

Article 12.

Liens on Certain Agricultural Products.

Sec.
44-69.2. Effective period for liens on fruits and vegetables.

ARTICLE 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.

CASE NOTES

The lien of this section attaches to the recovery, if any, and is not a general lien against the assets of the alleged debtor. Gordon v. Forsyth County Hosp. Auth., 409 F. Supp. 708 (M.D.N.C. 1975).

Right of Hospital Receiving Funds under Provisions of Hill Burton Act, 42 U.S.C. § 291 et seq., to File Lien under Section. — See Gordon v. Forsyth County Hosp. Auth., 409 F. Supp. 708 (M.D.N.C. 1975).

ARTICLE 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Cherokee, Chowan, Cleveland, Columbus, Cumberland, Dare, Davidson, Davie, Edgecombe, Forsyth, Franklin, Gaston, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452.)

Effect of Amendments. — The first 1977 amendment made this section applicable to Alleghany, Anson, Cleveland, Cumberland, Haywood, Henderson, McDowell, Mecklenburg, Surry, Transylvania, Tyrrell and Union Counties.

The second 1977 amendment inserted Ashe, Beaufort and Hyde and the third 1977 amendment added Randolph to the list of counties.

The first 1977, 2nd Sess., amendment made this section applicable to Harnett County.

The second 1977, 2nd Sess., amendment made this section applicable to Polk County.

The 1979 amendment inserted Chowan, Dare, Davie, Harnett, and Iredell in the list of counties.

ARTICLE 12.

Liens on Certain Agricultural Products.

§ 44-69.2. Effective period for liens on fruits and vegetables.

No security interest in or lien on fruits and vegetables sold at a regular sale at an auction market at which the Department of Agriculture furnishes certified inspectors pursuant to Article 17 of Chapter 106 is effective for any purpose more than six months after the date of the sale. This section does not absolve any person from prosecution and punishment for crime. (1981, c. 640, s. 2.)

Editor's Note. — Section Laws 1981, c. 640, s. 2, provides: "This act shall become effective July 1, 1981, and shall apply only to liens created after that date."

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

Sec.
44A-2. Persons entitled to lien on personal property.
44A-4. Enforcement of lien.

Article 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

Sec.
44A-12. Filing claim of lien.
44A-13. Action to enforce lien.

Article 3.

Model Payment and Performance Bond.

44A-34. Construction of Article.

ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-2. Persons entitled to lien on personal property.

(a) Any person who tows, alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of

(1) The reasonable charges for the services and materials; or
(2) The contract price; or
(3) One hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.

This lien shall have priority over perfected and unperfected security interests.

(b) Any person engaged in the business of operating a hotel, motel, or boardinghouse has a lien upon all baggage, vehicles and other personal property brought upon his premises by a guest or boarder who is an owner thereof to the extent of reasonable charges for the room, accommodations and other items or services furnished at the request of the guest or boarder. This lien shall not have priority over any security interest in the property which is perfected at the time the guest or boarder brings the property to said hotel, motel or boardinghouse.

(c) Any person engaged in the business of boarding animals has a lien on the animals boarded for reasonable charges for such boarding which are contracted for with an owner or legal possessor of the animal. This lien shall have priority over perfected and unperfected security interests.

(d) Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, or storing. This lien shall have priority over perfected and unperfected security interests.

(e) Any lessor of a house, room, apartment, office, store or other demised premises has a lien on all furniture, household furnishings, trade fixtures, equipment and other personal property to which the tenant has legal title and which remains on the demised premises if (i) the tenant has vacated the premises for 21 or more days after the paid rental period has expired, and (ii) the lessor has a lawful claim for damages against the tenant. If the tenant has vacated the premises for 21 or more days after the expiration of the paid rental period, or if the lessor has received a judgment for possession of the premises which is executable and the tenant has vacated the premises, then all property remaining on the premises may be removed and placed in storage. If the total value of all property remaining on the premises is less than one hundred dollars ($100.00), then it shall be deemed abandoned five days after the tenant has vacated the premises, and the lessor may remove it and may donate it to any charitable institution or organization. Provided, the lessor shall not have a lien if there is an agreement between the lessor or his agent and the tenant that the lessor shall not have a lien. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of sale. The lien created by this subsection shall be enforced by sale at public sale pursuant to the provisions of G.S. 44A-4(e). This lien shall not have priority over any security interest in the property which is perfected at the time the lessor acquires this lien.

(f) Any person who improves any textile goods in the ordinary course of his business pursuant to an express or implied contract with the owner or legal possessor of such goods shall have lien upon all goods of such owner or possessor in his possession for improvement. The amount of such lien shall be for the entire unpaid contracted charges owed such person for improvement of said goods including any amount owed for improvement of goods, the possession of which may have been relinquished, and such lien shall have priority over perfected and unperfected security interests. "Goods" as used herein includes any textile goods, yarns or products of natural or man-made fibers or combination thereof. "Improve" as used herein shall be construed to include processing, fabricating or treating by throwing, spinning, knitting, dyeing, finishing, fabricating or otherwise. (1967, c. 1029, s. 1; 1971, cc. 261, 403; c. 544, s. 1; c. 1197; 1973, c. 1298, s. 1; 1975, c. 461; 1981, c. 566, s. 2; c. 682, s. 9.)

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, rewrote the first sentence and added the second, third and fourth sentences in subsection (e).

The second 1981 amendment, effective July 1, 1981, substituted "G.S. 44A-4(e)" for "G.S. 44A-4(d)" at the end of the next-to-last sentence of subsection (e).

Legal Periodicals. — For note on garagemen's liens and duress of goods, see 54 N.C.L. Rev. 1106 (1976).

§ 44A-3. When lien arises and terminates.

Legal Periodicals. — For note on garagemen's liens and duress of goods, see 54 N.C.L. Rev. 1106 (1976).

§ 44A-4. Enforcement of lien.

(a) Enforcement by Sale. — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending or posts bond for double such amount, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party.

(b) Notice and Hearings. —

(1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall give notice to the Division of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Division a fee of four dollars ($4.00). The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Division by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Division that a hearing is desired and the Division shall notify lienor. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Division that a hearing is desired by the return of such form to the Division. Failure of the recipient to notify the Division within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted, the Division shall notify the lienor, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the Division shall transfer title to the property pursuant to such sale. If the Division is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a

sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Private Sale. — Sale by private sale may be made in any manner that is commercially reasonable. Not less than 30 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (f) hereof, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained. Notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(d) Request for Public Sale. — If an owner, the person with whom the lienor dealt, any secured party, or other person claiming an interest in the property notifies the lienor prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(e) Public Sale. —

(1) Not less than 20 days prior to sale by public sale the lienor:

a. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held;

and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:

a. In any county where any part of the contract giving rise to the lien was performed, or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(f) Notice of Sale. — The notice of sale shall include:

(1) The name and address of the lienor;

(2) The name of the person having legal title to the property if such person can be reasonably ascertained and the name of the person with whom the lienor dealt;

(3) A description of the property;

(4) The amount due for which the lien is claimed;

(5) The place of the sale;

(6) If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(g) Damages for Noncompliance. — If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1967, c. 1029, s. 1; 1975, c. 438, s. 1; c. 716, s. 5; 1977, c. 74, s. 4; c. 793, s. 1; 1981, c. 690, s. 26.)

Effect of Amendments. — The first 1977 amendment, effective July 1, 1977, in subdivision (e)(1), deleted "and by publishing notice of sale once per week for two consecutive weeks in a newspaper of general circulation in the same county" from the end of paragraph b and added the language beginning "and shall publish notice of sale" to the end of the subdivision.

The second 1977 amendment added the fourth sentence to the first paragraph of subsection (a). Session Laws 1977, c. 793, s. 2, provides: "This act shall apply to liens for storage arising on contracts made on and after the effective date." The act was ratified June 29, 1977, and made effective on ratification.

The 1981 amendment, effective July 1, 1981, substituted "four dollars ($4.00)" for "two dollars ($2.00)" at end of the first sentence of subdivision (b) (1).

Session Laws 1977, c. 74, s. 5, provides: "This act shall not affect pending litigation."

Legal Periodicals. — For note on garagemen's liens and duress of goods, see 54 N.C.L. Rev. 1106 (1976).

OPINIONS OF ATTORNEY GENERAL

Warehouseman With Liens Pursuant to Both Article 1 of Chapter 44A and Article 7 of UCC May Enforce Lien under § 25-7-210 without Allowing Owner Judicial Hearing under § 44A-4. — See opinion of Attorney General to Resa L. Harris, Legal Officer, Office of the Clerk of Superior Court, Mecklenburg County, 48 N.C.A.G. 2 (1979).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

Legal Periodicals. — For a survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

The 1975 amendment created a new right to a lien in those who perform or furnish professional design or surveying services. Wilbur Smith & Assocs. v. South Mt. Properties, Inc., 29 N.C. App. 447, 224 S.E.2d 692, cert. denied, 290 N.C. 552, 226 S.E.2d 514 (1976).

Quoted in Bryan v. Projects, Inc., 29 N.C. App. 453, 224 S.E.2d 689 (1976); Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

Legal Periodicals. — For article entitled, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

CASE NOTES

The 1975 amendment created a new right to a lien in those who perform or furnish professional design or surveying services. Wilbur Smith & Assocs. v. South Mt. Properties, Inc., 29 N.C. App. 447, 224 S.E.2d 692, cert. denied, 290 N.C. 552, 226 S.E.2d 514 (1976).

The lien created by this section is incident to and security for a debt. There can be no lien in the absence of an underlying debt. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

There must be a contract, express or implied, to create a laborer's or materialman's lien. The holder of the lien has a "security" that open or general creditors do not have and that is based on contract. Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6, rev'd on other grounds, 293 N.C. 688, 239 S.E.2d 566 (1977).

Without a contract the lien does not exist. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

Delivery of Materials to Site. — The lien claimant is not required to make the delivery personally of materials to the site of the improvement so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979).

Lien Is Inchoate until Perfected. — The lien provided for by this section is inchoate until perfected by compliance with §§ 44A-11 and 44A-12, and is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978) (decided prior to 1975 amendment).

When Plaintiff Cannot Establish Lien as Prime Contractor. — Plaintiff cannot establish a lien for labor and materials as a prime contractor when its own notice of claim of lien and judicial findings to which plaintiff consented establish it as a subcontractor. Outer Banks Contractors v. Forbes, 47 N.C. App. 371, 267 S.E.2d 63 (1980), aff'd, — N.C. —, 276 S.E.2d 375 (1981).

"Labor" under Former Statute. — The partial clearing and staking of the building lines on a construction was "labor" under former § 44A-8. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978) (decided prior to 1975 amendment).

The term "labor" in former § 44A-8 is not restricted to unskilled work of an inferior and toilsome nature. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978) (decided prior to 1975 amendment).

Quoted in Bryan v. Projects, Inc., 29 N.C. App. 453, 224 S.E.2d 689 (1976).

§ 44A-10. Effective date of liens.

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

CASE NOTES

Sufficient Notice of Improvement. — The partial clearing of a site and the staking of the outlines of the building, as the "first furnishing of labor" constitute a "visible commencement of an improvement" sufficient to put a prudent man on notice that a possible improvement is underway and that the property might be subject to a lien under § 44A-8. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

This section implies that there be a visible commencement of the improvement. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

Delivery of Materials to Site. — The lien claimant is not required to make the delivery personally of materials to the site of the improvement so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979).

Priority of Contractor's Lien as to Other Encumbrances. — By virtue of this section, a contractor's lien for all labor and materials furnished pursuant to a contract is deemed prior to any liens or encumbrances attaching to the property subsequent to the date of the contractor's first furnishing of labor or materials to the construction site. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

Priority of Lien Over Deed of Trust upon Foreclosure on Leasehold. — A materialmen's lien on a leasehold which is properly enforced so as to relate back prior to a deed of trust on the leasehold would, upon foreclosure, entitle the materialman to priority in that portion of the proceeds representing the value of the leasehold. Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

§ 44A-11. Perfecting liens.

Legal Periodicals. — For article entitled, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

CASE NOTES

Applied in Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

§ 44A-12. Filing claim of lien.

(c) Contents of Claim of Lien to Be Filed. — All claims of lien must be filed using a form substantially as follows:

CLAIM OF LIEN

(1) Name and address of the person claiming the lien:
(2) Name and address of the record owner of the real property claimed to be subject to the lien at the time the claim of lien is filed:
(3) Description of the real property upon which the lien is claimed: (Street address, tax lot and block number, reference to recorded instrument,

or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)

(4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:

(5) Date upon which labor or materials were first furnished upon said property by the claimant:

(5a) Date upon which labor or materials were last furnished upon said property by the claimant:

(6) General description of the labor performed or materials furnished and the amount claimed therefor:

. . . .
Lien Claimant

Filed this . . . . . day of . . . ., 19 . . . .
. . . .
Clerk of Superior Court

A general description of the labor performed or materials furnished is sufficient. It is not necessary for lien claimant to file an itemized list of materials or a detailed statement of labor performed.

(1977, c. 369.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, added subdivision (5a) to subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

CASE NOTES

Delivery of Materials to Site. — The lien claimant is not required to make the delivery personally of materials to the site of the improvement so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979).

Applied in Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978); Wolfe v. Hewes, 41 N.C. App. 88, 254 S.E.2d 204 (1979).

Quoted in Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Stated in Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

Cited in J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840 (1976); Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

§ 44A-13. Action to enforce lien.

(c) Notice of Action. — Unless the action enforcing the lien created by this Article is instituted in the county in which the lien is filed, in order for the sale under the provisions of G.S. 44A-14(a) to pass all title and interest of the owner to the purchaser good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming the lien, a notice of lis pendens shall be filed in each county in which the real property subject to the lien is located within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. It shall not be necessary to file a notice of lis pendens in the county in which the action enforcing the lien is commenced in order for the judgment entered therein and the sale declared thereby to carry with it the priorities set forth in G.S. 44A-14(a). If neither an action nor a notice of lis pendens is filed in each county in which the real property subject to the lien is located within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien, as to real property claimed to be subject to the lien in such counties where the action was neither commenced nor a notice of lis pendens filed, the judgment entered in the action enforcing the lien shall not direct a sale of the real property subject to the lien enforced thereby nor be entitled to any priority under the provisions of G.S. 44A-14(a), but shall be entitled only to those priorities accorded by law to money judgments. (1969, c. 1112, s. 1; 1977, c. 883.)

Effect of Amendments. — The 1977 amendment added subsection (c).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Legal Periodicals. — For article entitled, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

For a survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

Remedies Available to § 44A-8 Lienor. — The § 44A-8 lienor may proceed to enforce his lien and simultaneously bring an action to recover a personal judgment for the amount due. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

Delivery of Materials to Site. — The lien claimant is not required to make the delivery personally of materials to the site of the improvement so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979).

An action to enforce a lien need not be filed in the county where the land is situated. Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6, rev'd on other grounds, 293 N.C. 688, 239 S.E.2d 566 (1977).

Better Practice to File Where Claim of Lien Is Filed. — It is the better practice to file the action to enforce a lien in the county in which the claim of lien is filed. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Though Language in Subsection (a) Is Not Jurisdictional Requirement. — The language contained in subsection (a) stating that the action to enforce a lien "may be instituted in any county in which the lien is filed" is not a jurisdictional requirement. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

The 1977 amendment adding subsection (c) is a strong indication that it was not the intent of the legislature to enact a jurisdictional requisite when it used language in subsection (a) to the effect that such action "may be instituted in any county in which the lien is filed." Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Contest of Amount of Lien. — Subsection (b) of this section contemplates that a defendant has the right to contest the amount of plaintiff's lien during the enforcement proceedings, and not prior thereto. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

Contents of Judgment Enforcing Lien. — To enforce a materialmen's lien the judgment must state the effective date of the lien and contain a general description of the property subject to the lien so that one reading the docketed judgment would have notice that it was more than a money judgment. Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

The effect of subsection (c) is to give protection to purchasers and examiners of titles no matter where the action to enforce the lien is instituted. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Liens established pursuant to this Chapter are not "contractual security" within the meaning of Rule 55(b)(1) of the Rules of Civil Procedure and a clerk or assistant clerk of court is without jurisdiction to make orders consummating foreclosure of liens established pursuant to Chapter 44A of the General Statutes. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Dismissal of a suit on account of plaintiff's inability to establish an alleged lien was improper where the complaint, in addition to averring the lien and praying for its foreclosure, stated a good cause of action for labor performed or materials supplied. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

Cited in Miller v. Lemon Tree Inn of Wilmington, Inc., 39 N.C. App. 133, 249 S.E.2d 836 (1978).

§ 44A-16. Discharge of record lien.

CASE NOTES

Subdivision (6) is more for the benefit of the landowner than the lien-creditor. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

The lien-creditor has no choice under subdivision (6) as to whether the lien will be cancelled. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Landowner Free to Sell, Mortgage, etc., Land after Action under Subdivision (5) or (6). — Under subdivision (6) the landowner can post a bond and free his land from the weight of the lien while the parties litigate over the amount, if any, that may finally be determined to be due. He can accomplish the same result by depositing cash with the clerk under subdivision (5). He is then free to sell, mortgage or otherwise encumber the land free of the lien. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Applied in Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-17. Definitions.

CASE NOTES

Applied in Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

§ 44A-18. Grant of lien; subrogation; perfection.

Legal Periodicals. — For article entitled, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

For a survey of 1977 contract law, see 56 N.C.L. Rev. 926 (1978).

CASE NOTES

What Is First Tier Subcontractor's Lien Upon Funds. — The first tier subcontractor's lien upon funds contemplated by subsection (1) of this section is a lien upon funds which are owed and not upon funds which might have been owed had the contract been completed. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Lien under Subdivision (1) Necessary for Lien under § 44A-20(d). — The existence of a lien upon the realty granted by § 44A-20(d) is dependent upon the existence of a valid lien upon funds pursuant to subdivision (1) of this section. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

A lien upon realty may arise directly in favor of a first tier subcontractor under subdivision (1) of this section and § 44A-20 and the right to such a lien, unlike the right to a lien under § 44A-23, may arise without regard to whether the general contractor has waived its own lien rights. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Applied in Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977).

§ 44A-19. Notice to obligor.

CASE NOTES

Applied in Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977).

Cited in Outer Banks Contractors v. Forbes, 47 N.C. App. 371, 267 S.E.2d 63 (1980).

§ 44A-20. Duties and liability of obligor.

CASE NOTES

Lien under § 44A-18(1) Necessary for Lien under Subsection (d). — The existence of a lien upon the realty granted by subsection (d) is dependent upon the existence of a valid lien upon funds pursuant to § 44A-18(1). Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

A lien upon realty may arise directly in favor of a first tier subcontractor under § 44A-18(1) and this section and the right to such a lien, unlike the right to a lien under § 44A-23, may arise without regard to whether the general contractor has waived its own lien rights. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Applied in Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977).

§ 44A-22. Priority of liens.

Legal Periodicals. — For article entitled, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

§ 44A-23. Contractor's lien; subrogation rights of subcontractor.

CASE NOTES

The subcontractor is entitled to a lien under this section only by way of subrogation; his lien rights are dependent upon the lien rights of the general contractor. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Barring Subcontractor's Rights. — No action of the contractor will be effective to prejudice the rights of the subcontractor without his written consent upon the filing of the notice and claim of lien and the commencement of the action; prior to that time, however, the general contractor is free to waive its lien rights and to bar effectively the subcontractor's rights by way of subrogation. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

ARTICLE 3.

Model Payment and Performance Bond.

§ 44A-25. Definitions.

CASE NOTES

Applied in Interstate Equip. Co. v. Smith, 292 N.C. 592, 234 S.E.2d 599 (1977).

§ 44A-34. Construction of Article.

The addition of this Article shall not be construed as making the provisions of Articles 1 and 2 of Chapter 44A of the General Statutes apply to public bodies of public buildings. (1973, c. 1194, s. 3.)

Editor's Note. — The above section is derived from Session Laws 1973, c. 1194, s. 3. It was not previously codified.

Chapter 45.

Mortgages and Deeds of Trust.

Article 2.

Right to Foreclose or Sell under Power.

Sec.
45-13. [Repealed.]
45-18. Validation of certain acts of substituted trustees.
45-20.1. Validation of trustees' deeds where seals omitted.
45-20.2. [Repealed.]

Article 2A.

Sales under Power of Sale.

Part 1. General Provisions.

45-21.12. Power of sale barred when foreclosure barred.

Part 2. Procedure for Sale.

45-21.16. Notice and hearing.
45-21.17. Posting and publishing notice of sale of real property.
45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.
45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

Article 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

Sec.
45-21.42. Validation of deeds where no order or record of confirmation can be found.

Article 4.

Discharge and Releases.

45-36.3. Notification by mortgagee of satisfaction of provisions of deed of trust or mortgage, or other instrument; civil penalty.
45-40. Register to enter satisfaction on index.

Article 7.

Instruments to Secure Future Advances and Future Obligations.

45-70. Priority of security instrument.
45-75 to 45-79. [Reserved.]

Article 8.

Instruments to Secure Certain Home Loans.

45-80. Priority of security instruments securing certain home loans.

ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-13: Repealed by Session Laws 1981, c. 599, s. 12, effective October 1, 1981.

Editor's Note. — Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

§ 45-18. Validation of certain acts of substituted trustees.

Whenever before January 1, 1979, a trustee has been substituted in a deed of trust in the manner provided by G.S. 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, has not been registered as provided by said sections until after the substitute trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, had been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13; 1963, c. 241; 1967, c. 945; 1969, c. 477; 1971, c. 57; 1973, c. 20; 1979, c. 580.)

Effect of Amendments. — The 1979 amendment substituted "1979" for "1973" and substituted "has" for "and the certificate of the clerk of the superior court executed in connection therewith under the provisions of G.S. 45-12, have" preceding "not been registered," near the beginning and deleted the words "and the clerk's certificate thereon" which previously preceded "had been registered" near the end of the section.

§ 45-20.1. Validation of trustees' deeds where seals omitted.

All deeds executed prior to January 1, 1981, by any trustee or substitute trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee or substitute trustee has omitted to affix his seal after his signature are validated. (1943, c. 171; 1981, c. 183, s. 1.)

Effect of Amendments. — The 1981 amendment substituted "January 1, 1981" for "January 1940," inserted "or substitute trustee" in two places, substituted "are validated" for "shall be good and valid" and deleted a proviso to the effect that the section should not apply to actions instituted and pending prior to May 15, 1943. Session Laws 1981, c. 183, s. 3, provides that the act does not affect pending litigation.

§ 45-20.2: Repealed by Session Laws 1981, c. 183, s. 2.

Cross References. — For present section incorporating the provisions of the repealed section, see § 45-20.1.

Editor's Note. — Session Laws 1981, c. 183, s. 3, provides that the act shall not affect pending litigation.

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definition.

CASE NOTES

Applied in City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585 (1979).

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.

Legal Periodicals. — **For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).**

§ 45-21.10. Requirement of cash deposit at sale.

CASE NOTES

Trustee's Discretion as to Whether Cash Deposit Required. — A trustee's advertisement for a foreclosure sale which states that the "highest bidder will be required to make a cash deposit" does not eliminate the trustee's exercise of discretion as to whether he will require the cash deposit when the terms of the deed of trust do not require a cash deposit. White v. Lemon Tree Inn, 35 N.C. App. 117, 239 S.E.2d 878 (1978).

§ 45-21.12. Power of sale barred when foreclosure barred.

(b) If a sale pursuant to a power of sale contained in a mortgage or deed of trust, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of hearing or the notice of sale is first filed, given, served, posted, or published, whichever occurs first, as provided by this Article or by the terms of the instrument pursuant to which the power of sale is being exercised. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1969, c. 984, s. 1; 1977, c. 359, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, in the second sentence of subsection (b), inserted "the notice of hearing or," "filed, given, served," and "whichever occurs first" and deleted "the" preceding "sale is first filed." Session Laws 1977, c. 359, s. 18, provides: "This act shall become effective on October 1, 1977, and shall apply only to those foreclosure actions commenced on or after that date."

Session Laws 1977, c. 359, s. 17, provides that the act shall not apply to pending litigation.

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall serve upon each party entitled to notice under this section a notice of hearing. The notice shall specify a time and place for a hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served in any manner provided by the Rules of Civil Procedure for the service of summons, or may be served by actual delivery by registered or certified mail, return receipt requested; provided, that in those instances in which service by publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property for a period of not less than 10 days before the date of the hearing; provided further, if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting a notice in a conspicuous place and manner upon the property for a period of not less than 20 days before the date of hearing, which 20-day period may run concurrently with any other effort to effect service.

(b) Notice of hearing shall be given in a manner authorized in subsection (a) to:

(1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.

(2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.

(3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time of giving notice. The term "record owner" means any person owning a present or future interest of record in the real property which interest would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, mechanic's or materialman's lien, or other lien or security interest in the real property.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

(1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, and book and page of the security instrument.

(2) The name and address of the holder of the security instrument, and if different from the original holder, his name and address.

(3) The nature of the default claimed.

(4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.

(5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.

(6) Repealed by Session Laws 1977, c. 359, s. 7.

(7) The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.

(8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.

(9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.

(10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.

(d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes 10 or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejectment actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no session of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or the chief district judge of a district where any part of the real estate is located, who shall be authorized to hear the appeal.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. In any case in which the original principal amount of indebtedness secured was one hundred thousand dollars ($100,000), or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by written instrument signed by such party. In all other cases, at any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above. (1975, c. 492, s. 2; 1977, c. 359, ss. 2-10.)

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, added the second proviso at the end of subsection (a), substituted "given in a manner authorized in subsection (a)" for "sent" in the introductory language of subsection (b), deleted "To" from the beginning of subdivision (2) of subsection (b), rewrote subdivision (3) of subsection (b), and in subsection (c), deleted "the date by which such payment may be made or cure effected, the amount to pay or steps necessary to cure by such date, and to whom payment should be made or notice of cure given" from the end of subdivision (5), deleted subdivision (6), which read "The date, time and place when and where the real estate will be sold, unless the obligation is earlier satisfied," and added present subdivision (10). In subsection (d), the amendment substituted "authorize" for "further find that" and "to proceed" for "can proceed" in the third sentence, added the present fifth sentence, and rewrote the sixth sentence. The amendment also substituted "session" for "term" and the language beginning "any regular or special superior court judge" and ending "real estate is located" for "the resident superior court judge or chief district court judge" in the second sentence, of subsection (e), inserted the present second sentence of subsection (f), and added "In all other cases" to the beginning of the present third sentence of subsection (f).

Session Laws 1977, c. 359, s. 18, provides: "This act shall become effective on October 1, 1977, and shall apply only to those foreclosure actions commenced on or after that date."

Session Laws 1977, c. 359, s. 17, provides that the act shall not apply to pending litigation.

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

CASE NOTES

Intent of Section. — This section was intended by the legislature to meet minimum due process requirements, not to engraft upon the procedure for foreclosure under a power of sale all of the requirements of a formal civil action. In re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

The intent of the General Assembly in enacting the notice and hearing provision of this section was not to alter the essentially contractual nature of the remedy of foreclosure under a power of sale, but rather to satisfy the minimum due process requirements of notice to interested parties and hearing prior to foreclosure and sale. In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

The term "record owner" in this section was intended to refer to either the original mortgagor of the property or a present owner who has purchased property subject to a mortgage. Seashore Properties, Inc. v. East Fed. Sav. & Loan Ass'n, 47 N.C. App. 675, 267 S.E.2d 693 (1980).

Evidence of Valid Debt. — The introduction of a promissory note along with evidence of execution and delivery, in the absence of probative evidence to the contrary, will support the finding of a valid debt in a proceeding to foreclose under a power of sale. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Purpose of Notice and Hearing. — The notice and hearing required by this section were designed to enable the mortgagor to utilize the injunctive relief already available in this section. The hearing was not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

The hearing provided for in this section was not intended to settle all matters in controversy between the parties and the appropriate means for invoking equity jurisdiction is an action pursuant to § 45-21.34. Golf Vistas, Inc. v. Mortgage Investors, 39 N.C. App. 230, 249 S.E.2d 815 (1978).

Due Process Requirements in Proceedings before Clerk of Court. — Inasmuch as this section was the first legislation enacted which affected foreclosure proceedings after the decision in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975) (which held the then existing procedures before the clerk unconstitutional), it is safe to assume that the legislature was responding to the due process requirements set out in that case. This section, therefore, would be concerned solely with procedures taking place before the clerk of court and appeals therefrom to the district or superior court, not with the more traditional and constitutionally permissible procedures for appeal from the district court or the superior court to the Court of Appeals. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Notice Insufficient. — The clerk of court erred in permitting a foreclosure sale of property pursuant to a deed of trust where the debtor was not given notice of the foreclosure hearing in a manner prescribed by subsection (a) of this section, a letter to and telephone conversation with the debtor being insufficient and the debtor's actual knowledge of the hearing being irrelevant. PMB, Inc. v. Rosenfeld, 48 N.C. App. 736, 269 S.E.2d 748 (1980), cert. denied, — N.C. —, 274 S.E.2d 231 (1981).

Notice Not Fatally Defective. — A notice of a foreclosure hearing before the clerk of court was not fatally defective in that the notice, dated December 8, 1978, stated that the hearing would be held on January 3, 1978, rather than 1979. Lovell v. Rowan Mut. Fire Ins. Co., 46 N.C. App. 150, 264 S.E.2d 743 (1980), rev'd on other grounds, — N.C. —, 274 S.E.2d 170 (1981).

Failure to Contradict Evidence of Possession and Past Due Note. — If the respondent in a proceeding to foreclose under a power of sale fails to offer any evidence to contradict evidence of possession and of a past due note when it is introduced in a foreclosure proceeding, the trial court's finding of default will not be disturbed on appeal. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Beneficiaries of Deed of Trust as Holders. — There was ample evidence that the beneficiaries of a deed of trust were holders of a valid debt where the notes secured by the deed of trust were payable to the beneficiaries or order, the notes were not endorsed, and the notes were in the possession of the original beneficiary-payees. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

The definition of "holder" in § 25-1-201(20) is applicable to this section. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Ownership is not indispensable to holdership. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Limitation on Findings of Fact. — The clerk of superior court is limited to making the four findings of fact specified in this section, and it follows that the superior court judge is similarly limited in the hearing de novo. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

The determination of the amount owed on a debt is beyond the scope of the hearing under this section. In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

When Valid Debt of Which Party Seeking Foreclosure Is Holder. — Subsection (d)(i) of this section permits the clerk to find a valid debt of which the party seeking to foreclose is a holder if there is competent evidence that the party seeking to foreclose is the holder of some valid debt, irrespective of the exact amount owed. In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

When Right to Foreclose. — Subsection (d)(iii) of this section permits the clerk to find a right to foreclose under the instrument if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case. In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

No trial by jury is required in hearings conducted under this section. In re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

Measure of Damages. — Interest accruing on the indebtedness during the pendency of stay would be a proper measure of damages under a bond conforming to the language of this section. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

The language of this section is considerably broader than the language under either §§ 45-21.34 or 1-292. It must be concluded, therefore, that the legislature intended that the courts have great latitude in measuring damages under this section. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

A superior court judge is not authorized to invoke equity jurisdiction in a hearing de novo on appeal pursuant to subsection (d) of this section. He is limited to hearing the same matters in controversy which were before the clerk of superior court. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

Bonds for Appeals to Court of Appeals. — In foreclosure proceedings a clerk may require a bond by an appealing respondent pursuant to subsection (d), and a superior court judge may require a bond upon appeal from that court pursuant to § 1-292, and if the bond is not posted, the trustee may proceed with the foreclosure; however, neither statute gives the clerk or judge the power to make the posting of a bond a condition to the appeal, and it is error for the superior court to dismiss an appeal from that court when the bond required by the court is not posted. In re Coley Properties, Inc., 50 N.C. App. 413, 273 S.E.2d 738 (1981).

This section governs only the bond covering the appeal from the clerk to the trial court; bonds for appeals from the traditional trial courts to the Court of Appeals in foreclosure actions are governed as they previously were by § 1-292. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Issues to Be Determined on Appeal. — Upon appeal from an order of the clerk authorizing the trustee to proceed with sale, the judge is limited upon the hearing de novo to determining the same four issues resolved by the clerk. Those issues are: The existence of: (1) valid debt of which the party seeking to foreclose is the holder; (2) default; (3) right to foreclose under the instrument; and (4) notice to those entitled to such. In re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

Return Insufficient to Show Service. — Homeowners were entitled to attack the foreclosure proceeding against the property either by a motion in the cause or by an independent action, because the officer's return was insufficient on its face to show service upon the homeowner husband in that the return did not show the place where the papers were left. Hassell v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980).

Although an officer's return was insufficient to show service upon plaintiff husband in mortgage foreclosure proceedings because it did not show the place where the papers were left, such defect was not necessarily fatal to the foreclosure proceedings, and the matter was remanded for the trial judge to determine within his discretion whether the sheriff's return ought to be amended so as to comport with facts regarding the place and manner of service. Hassell v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980).

Waiver of Notice. — Where a party to a foreclosure hearing argues that he received no notice of the hearing, but the record on appeal shows that he was present at the hearing and participated in it, that party waived notice of the foreclosure hearing. In re Norton, 41 N.C. App. 529, 255 S.E.2d 287 (1979).

Cited in In re Hill, 36 N.C. App. 765, 245 S.E.2d 378 (1978); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980).

§ 45-21.16A. Contents of notice of sale.

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Applied in Seashore Properties, Inc. v. East Fed. Sav. & Loan Ass'n, 47 N.C. App. 675, 267 S.E.2d 693 (1980).

§ 45-21.17. Posting and publishing notice of sale of real property.

In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

(4) The notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 whose address is known to the trustee or mortgagee and in addition shall also be mailed by first-class mail to any party desiring a copy of the notice of sale who has complied with subdivision (5) below. Notice of the hearing required by G.S. 45-21.16 shall be sufficient to satisfy the requirement of notice under this section provided such notice contains the information required by G.S. 45-21.16A.

(5) a. Requests for Copies of Notice. — Any person desiring a copy of any notice of default and sale under any security instrument with power of sale upon real property may, at any time subsequent to the recordation of the security instrument and prior to the giving of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of the county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:

"In accordance with the provisions of G.S. 45-21.17(5) request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on . . . ., 19. . . ., in Book . . . ., page . . . . ., records of . . . . . . County, North Carolina, executed by . . . . as trustor (mortgagor), in which . . . . is named as beneficiary (mortgagee), and . . . . as trustee, be mailed to . . . . at the following address: . . . .

Signature: . . . ."

b. Register of Deeds' Duties. — Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a marginal entry in the index of the book and page of the recorded security instrument to which the request refers; or upon the filing for record of such request, the register of deeds may instead of indexing such request on the general index of grantors stamp upon the face of the security instrument referred to in the request the book and page of each request for notice thereunder.

c. Mailing Notice. — The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in a duly recorded request therefor as specified in [paragraph] a above, directed to the address designated in such request.

d. Effect of Request on Title. — No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of notice has any claim or any right, title or interest in, or lien or charge upon, the property described in the deed of trust or mortgage referred to therein.

e. Evidence of Compliance. — The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed prima facie true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then he shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.

f. Action to Set Foreclosure Sale Aside for Failure to Comply. — A person entitled to notice of sale by virtue of G.S. 45-21.17(5)a shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to the filing of the final report and account as provided in G.S. 45-21.33, if the property is purchased by someone other than the secured party; or if brought by the secured party, unless the action is brought within six months of the date of such filing and prior to the time the secured party sells the property to a bona fide purchaser for value; nor unless the party bringing such action also tenders an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.

g. Action for Damages from Foreclosure Sale for Failure to Comply. — A person entitled to notice of sale by virtue of G.S. 45-21.17(5)a shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of the filing of the final report and account as provided in G.S. 45-21.33, nor unless the party bringing such action also deposits with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action.

(6) Any time periods relating to notice of hearing or notice of sale that are provided in the security instrument may commence with and run concurrently with the time periods provided in G.S. 45-21.16 or 45-21.17. (1949, c. 720, s. 1; 1965, c. 41; 1967, c. 979, s. 3; 1975, c. 492, s. 3; 1977, c. 359, ss. 11-14.)

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, inserted "by first-class mail" in 2 places in subdivision (4), rewrote paragraph e and added paragraphs f and g of subdivision (5), and added subdivision (6). Session Laws 1977, c. 359, s. 18, provides: "This act shall become effective on October 1, 1977, and shall apply only to those foreclosure actions commenced on or after that date."

Session Laws 1977, c. 359, s. 17, provides that the act shall not apply to pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivisions (4), (5), and (6) are set out.

Legal Periodicals. — For survey of 1972 case law on notice requirements of the nonjudicial foreclosure sale, see 51 N.C.L. Rev. 1110 (1973).

For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

Due Process Satisfied. —

The legislature intended to meet the requirements of due process by demanding both posting and publication under this section. Albemarle Realty & Mtg. Co. v. Peoples Bank, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

Both Posting and Publication Required. — This section, read as a whole, requires both publishing and posting for full notice. Albemarle Realty & Mtg. Co. v. Peoples Bank, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

Where Date on Notice Is Not Date of Posting. — As long as minimum due process is met, there is no reason to preclude proof that the date on the face of the notice was not the actual date of posting. Albemarle Realty & Mtg. Co. v. Peoples Bank, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

The provisions of subdivision (4) of this section do not apply to a tax foreclosure sale. City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585, cert. denied, 297 N.C. 608, 257 S.E.2d 217 (1979).

§ 45-21.21. Postponement of sale.

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

§ 45-21.29. Resale of real property; jurisdiction; procedure; orders for possession.

Legal Periodicals. — For survey of 1972 case law on notice requirements of the nonjudicial foreclosure sale, see 51 N.C.L. Rev. 1110 (1973).

For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Both Posting and Publication Required. — The legislature intended to meet the requirements of due process by demanding both posting and publication under this section. Albemarle Realty & Mtg. Co. v. Peoples Bank, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

Applied in Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980).

Cited in Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979).

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

(c) When the highest bidder at a sale or resale of real property fails to comply with his bid upon tender to him of a deed for the property or after a bona fide attempt to tender such deed, the person authorized to sell the property may hold a resale. The procedure for such resale is the same in every respect as is provided by this Article in the case of an original sale of real property except that the provisions of G.S. 45-21.16 are not applicable to a resale, and the provisions of G.S. 45-21.29(b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(1977, c. 359, s. 15.)

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, inserted "of G.S. 45-21.16 are not applicable to a resale, and the provisions" in the second sentence of subsection (c). Session Laws 1977, c. 359, s. 18, provides: "This act shall become effective on October 1, 1977, and shall apply only to those foreclosure actions commenced on or after that date."

Session Laws 1977, c. 359, s. 17, provides that the act shall not apply to pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (c) is set out.

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Applied in Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

(a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of —

(1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;

(2) Taxes due and unpaid on the property sold, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;

(3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;

(4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

(b) Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale was had—

(1) In all cases when the owner of the property sold is dead and there is no qualified and acting personal representative of his estate, and

(2) In all cases when he is unable to locate the persons entitled thereto, and

(3) In all cases when the mortgagee, trustee or vendor is, for any cause, in doubt as to who is entitled to such surplus money, and

(4) In all cases when adverse claims thereto are asserted.

(c) Such payment to the clerk discharges the mortgagee, trustee or vendor from liability to the extent of the amount so paid.

(d) The clerk shall receive such money from the mortgagee, trustee or vendor and shall execute a receipt therefor.

(e) The clerk is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto, or until it is paid out under the order of a court of competent jurisdiction. (1949, c. 720, s. 1; 1951, c. 252, s. 1; 1967, c. 562, s. 2; 1981, c. 682, s. 10.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "G.S. 105-385" for "G.S. 105-408" in subdivisions (2) and (3) of subsection (a).

CASE NOTES

Liens Against Surplus From Sale of Property Owned By Tenants By the Entirety. — Where real property owned by husband and wife as tenants by the entirety was involuntarily foreclosed upon and sold pursuant to a power of sale in a deed of trust, the surplus of such sale constructively retained the characteristics of property held by the entirety; thus the I.R.S. had no lien against the property since it only had a lien against property owned solely by the husband. In re Foreclosure of Deed of Trust, 50 N.C. App. 69, 272 S.E.2d 893 (1980).

§ 45-21.33. Final report of sale of real property.

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Cited in Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

CASE NOTES

Proper Method for Invoking Equity Jurisdiction. — The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the superior court pursuant to this section. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

The hearing provided for in § 45-21.16 was not intended to settle all matters in controversy between the parties and the appropriate means for invoking equity jurisdiction is an action pursuant to this section. Golf Vistas, Inc. v. Mortgage Investors, 39 N.C. App. 230, 249 S.E.2d 815 (1978).

Injunctive Relief Is Available Prior to Confirmation. — The injunctive relief provided by this section is available prior to the confirmation of the foreclosure sale. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

Applied in In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

Cited in Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

Legal Periodicals. — For note on anti-deficiency judgment statute, see 58 N.C.L. Rev. 855 (1980).

CASE NOTES

This section is not available as a defense to nonmortgagor defendants in an action to recover the balance due on a promissory note. Only a party with an interest in the mortgaged property may assert this section as a bar to the action. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

This section does not forbid the holder of the note secured by a deed of trust to purchase the property at a foreclosure sale conducted pursuant to the power of sale contained in the deed of trust. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

This section does not entitle the debtor to have credited upon the note whatever profit such purchaser may realize upon a subsequent sale of the property. There is no principle of law, apart from this section, which entitles the debtor to such credit simply by reason of such subsequent sale of the property at a price greater than the bid at the foreclosure sale. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

A sale subsequent to the foreclosure sale would be a circumstance indicating the fair value of the property at the time of the foreclosure, the weight to be given it depending upon other circumstances such as the lapse of time between the foreclosure and the subsequent sale and the known probability, at the time of the foreclosure sale, that such subsequent sale could be made. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For note on purchase-money mortgages and suit on the note, see 15 Wake Forest L. Rev. 822 (1979).

For note on anti-deficiency judgment statute, see 58 N.C.L. Rev. 855 (1980).

For an article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

Legislative Intent. —

The manifest intention of the legislature in this section was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price. Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979).

The legislature intended to take away from creditors the option of suing upon the note in a purchase-money mortgage transaction. Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979).

Evidence of Indebtedness Must Show Debt for Purchase-Money for Realty. — A strict reading of this section reveals that this statute does not apply unless the "evidence of indebtedness," i.e., the note and deed of trust, shows on its face that the debt is for the purchase-money for real property. Gambill v. Bare, 32 N.C. App. 597, 232 S.E.2d 870, cert. denied, 292 N.C. 640, 235 S.E.2d 61 (1977).

The benefits of this section cannot be waived; it effects the broad public purpose of abolishing deficiency judgments in purchase money transactions if foreclosure on the security yields an insufficient fund to satisfy the indebtedness secured, and the protection it offers is afforded to all purchasers of realty who secure any part of the purchase price with a deed of trust on the realty they are purchasing. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

The protection of the anti-deficiency judgment statute was designed for the benefit of the general public and was not intended to be merely a right which could be waived, or which purchasers could be compelled to waive as a prerequisite for obtaining financing. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

And the doctrine of estoppel will not deprive a defendant of his right to assert this section in his defense to a deficiency proceeding; were a purchaser able, either by his action or by contract, to deny to himself the protection afforded him by the legislature, it would be to allow by indirection that which was directly forbidden. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

Leasehold Interest Is Outside Scope of Section. — The protection provided by this section only applies to transactions involving the sale of real property; where there was no sale of real property, but only an assignment for valuable consideration of a leasehold interest, the protection provided by this section does not apply. Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638 (1979), aff'd, 299 N.C. 510, 263 S.E.2d 595 (1980).

Thus, this section does not prohibit an in personam action based upon an underlying obligation secured by a mortgage on a leasehold interest. Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638 (1979), aff'd, 299 N.C. 510, 263 S.E.2d 595 (1980).

Where a note and deed of trust cross-refer to each other, and incorporate each other by reference, and only one of the documents clearly indicates the purchase money nature of the transaction, the other document may be deemed to include the same language indicating the nature of the transaction; therefore, a note which has been executed but not marked as a "purchase money note" may still conform to the statutory prerequisites for asserting this section as a defense. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

A defendant's guaranty of the obligations of a corporation under a lease/purchase agreement will not remove him from the protection of the anti-deficiency statute and make him liable for the entire face amount of the note, where the option to purchase was assigned to defendant personally, and defendant exercised it by taking title to the property in himself and personally signing the note and deed of trust; all of the obligations and promises merged in defendant who became an ordinary purchaser of realty who financed his acquisition of the property by a purchase money note and deed of trust. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

Applied in Armel Mgt. Corp. v. Stanhagen, 35 N.C. App. 571, 241 S.E.2d 713 (1978).

Cited in First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

ARTICLE 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.42. Validation of deeds where no order or record of confirmation can be found.

In all cases prior to the first day of March, 1974, where sales of property have been made under the power of sale contained in any deed of trust, mortgage or other instrument conveying property to secure a debt or other obligation, or where such sales have been made pursuant to an order of court in foreclosure proceedings and deeds have been executed by any trustee, mortgagee, commissioner, or person appointed by the court, conveying the property, or security, described therein, and said deed, or other instrument so executed, containing the property described therein, to the highest bidder or purchaser of said sale and such deed, or other instrument, contains recitals to the effect that said sale was reported to the clerk of the superior court, or to the court, and/or such sale was duly confirmed by the clerk of the superior court, or court, then and in that event all such deeds, conveyances, or other instruments, containing such recitals are declared to be lawful, valid and binding upon all parties to the proceedings, or parties named in such deeds of trust, mortgages, or other orders or instruments, and are hereby declared to be effective and valid to pass title for the purpose of transferring title to the purchasers at such sales with the same force and effect as if an order of confirmation had been filed in the office of the clerk of the superior court, or with the court, together with necessary reports and other decrees and to the same effect as if a record had been made in the minutes of the court of such orders, decrees and confirmations, provided that nothing contained in this section shall be construed as applicable to or affecting pending litigation. (1945, c. 984; 1949, c. 720, s. 4; 1957, c. 505; 1979, c. 242.)

Effect of Amendments. — The 1979 amendment substituted "1974" for "1957" preceding "where sales of property" near the beginning of the section.

§ 45-21.45. Validation of foreclosure sales where notice and hearing not provided.

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Cited in MaCay v. Morris, 46 N.C. App. 791, 266 S.E.2d 5 (1980).

ARTICLE 4.

Discharge and Release.

§ 45-36.3. Notification by mortgagee of satisfaction of provisions of deed of trust or mortgage, or other instrument; civil penalty.

(a) After the satisfaction of the provisions of any deed of trust or mortgage, or other instrument intended to secure with real property the payment of money or the performance of any other obligation and registered as required by law, the holder of the evidence of the indebtedness, if it is a single instrument, or a duly authorized agent or attorney of such holder shall within 60 days:

(1) Discharge and release of record such documents and forward the cancelled documents to the grantor or mortgagor; or,

(2) Alternatively, the holder of the evidence of the indebtedness or a duly authorized agent or attorney of such holder, at the request of the mortgagor or grantor, shall acknowledge the satisfaction of said instrument's terms in writing on the face of said instrument and forward said instrument and the deed of trust or mortgage instrument, marked "paid and satisfied," to the grantor or mortgagor.

(b) Any person, institution or agent who fails to cancel of record or give the notice required by this section may be required to pay a civil penalty of one hundred dollars ($100.00) in addition to attorneys' fees and any other damages awarded by the court to the grantor or mortgagor: Provided, that prior to the institution of an action pursuant to this section, the petitioner shall give written notice to mortgagee, obligee or other responsible party of his intention to bring the action; and upon receipt of this notice, the mortgagee, obligee or other responsible party shall have an additional 30 days to fulfill the requirements of this section. (1979, c. 681, s. 1.)

Editor's Note. — Session Laws 1979, c. 681, s. 2, makes this section effective Jan. 1, 1980.

§ 45-40. Register to enter satisfaction on index.

When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, then the register of deeds or his deputy shall enter upon the alphabetical grantor index kept by him, as required by law, and opposite the names of the grantor and grantee and on a line with the names of said grantor and grantee, the words "satisfied mortgage," if the instrument of which satisfaction has been acknowledged or entered is a mortgage, and the words "satisfied deed of trust," if the instrument of which satisfaction has been acknowledged or entered is a deed of trust, or, in lieu of the entries herein provided, the register of deeds or his deputy may denote satisfaction in the grantor index by using a capital "C" or the word "Cancelled," or the word "Satisfied." This statute shall not apply to counties using computerized indexing or to counties in which a parcel identifier index is established pursuant to G.S. 161-22.2. (1909, c. 658, s. 1; C. S., s. 2595; 1965, c. 771; 1977, c. 1107; 1979, c. 700, s. 1.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, added the second sentence.

The 1979 amendment added the words "or to counties in which a parcel identifier index is established pursuant to G.S. 161-22.2" in the second sentence.

ARTICLE 5.

Miscellaneous Provisions.

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.

CASE NOTES

Quoted in Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

ARTICLE 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-67. Definition.

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

CASE NOTES

Cited in Miller v. Lemon Tree Inn of Wilmington, Inc., 39 N.C. App. 133, 249 S.E.2d 836 (1978).

§ 45-68. Requirements.

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§ 45-69. Fluctuation of obligations within maximum amount.

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-70. Priority of security instrument.

(a) Any security instrument which conforms to the requirements of this Article and which on its face shows that the making of future advances is obligatory, shall, from the time and date of registration thereof, have the same priority to the extent of all obligatory future advances secured by it, as if all the advances had been made at the time of the executions of the instrument. An advance shall be deemed obligatory if the secured party has bound himself to make it, whether or not a subsequent event of default or other event not within his control has relieved or may relieve him from his obligation.

(1979, c. 594.)

Effect of Amendments. — The 1979 amendment added the second sentence in subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment only subsection (a) is set out.

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§ 45-71. Satisfaction of the security instrument.

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-72. Termination of future optional advances.

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-73. Cancellation of record; presentation of notes described in security instrument sufficient.

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-74. Article not exclusive.

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

CASE NOTES

Applied in Miller v. Lemon Tree Inn of Wilmington, Inc., 39 N.C. App. 133, 249 S.E.2d 836 (1978).

§§ 45-75 to 45-79: Reserved for future codification purposes.

Article 8.

Instruments to Secure Certain Home Loans.

§ 45-80. Priority of security instruments securing certain home loans.

(a) Notwithstanding any other provision of law, a deed of trust or mortgage which secures a loan that complies with subsection (b) below shall have priority and continue to have priority from the time and date of registration thereof to the extent of all principal and interest secured by said deed of trust or mortgage notwithstanding that the loan may be renewed or extended one or more times and notwithstanding that the interest rate may be increased or decreased from time to time. Interest which accrues pursuant to changes in the interest rate made pursuant to a method agreed to as provided in subsection (b) below (whenever such changes are made) shall be secured and have priority from the registration of the deed of trust or mortgage and not from the time changes are made.

(b) With respect to a loan referred to in subsection (a) above:

(1) The parties must provide in a written instrument agreed to by the borrower at or before registration of the deed of trust or mortgage that the loan may be renewed or extended in accordance with stated terms and that the interest rate may be increased or decreased according to a stated method; and

(2) The loan must be a loan described in G.S. 24-1.1A(a)(1) or (2).

(c) The provisions of this section shall not be deemed exclusive and no deed of trust or mortgage or other security instrument which is otherwise valid shall be invalidated by failure to comply with the provision of this section. (1979, 2nd Sess., c. 1182.)

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

Sec.
46-3.1. Court's authority to make orders pending final determination of proceeding.

Article 2.

Partition Sales of Real Property.

46-28.1. Petition for revocation of confirmation order.

Sec.
46-28.2. When confirmation order final.
46-33. Shares in proceeds to cotenants secured.

ARTICLE 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

CASE NOTES

Proceedings Are Equitable in Nature. — In this State partition proceedings have been consistently held to be equitable in nature, and the statutes are not a strict limitation upon the authority of the court. Dunn v. Dunn, 37 N.C. App. 159, 245 S.E.2d 580 (1978).

§ 46-3. Petition by cotenant or personal representative of cotenant.

CASE NOTES

I. IN GENERAL.

Tenancy in common is necessary, etc. — In accord with 2nd paragraph in original. See Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

§ 46-3.1. Court's authority to make orders pending final determination of proceeding.

Pending final determination of the proceeding, on application of any of the parties in a proceeding to partition land, the court may make such orders as it considers to be in the best interest of the parties, including but not limited to orders relating to possession, payment of secured debt or other liens on the property, occupancy and payment of rents, and to include the appointment of receivers pursuant to G.S. 1-502(6). (1981, c. 584, s. 1.)

Editor's Note. — Session Laws 1981, c. 584, s. 3, provides: "This act is effective upon ratification and applies to pending proceedings." The act was ratified June 16, 1981.

§ 46-7. Commissioners appointed.

CASE NOTES

Action by Two Commissioners. — Where the court in a partitioning proceeding ordered that "the commissioners" conduct a lottery before the clerk to determine the allotment of the separate parcels, the absence of one of the three commissioners because of illness when the drawing before the clerk was held did not invalidate the drawing. Dunn v. Dunn, 37 N.C. App. 159, 245 S.E.2d 580 (1978).

§ 46-10. Commissioners to meet and make partition; equalizing shares.

CASE NOTES

Cited in Macon v. Edinger, 49 N.C. App. 620, 272 S.E.2d 411 (1980).

§ 46-17. Report of commissioners; contents; filing.

CASE NOTES

Cited in Dunn v. Dunn, 37 N.C. App. 159, 245 S.E.2d 580 (1978).

§ 46-19. Confirmation and impeachment of report.

CASE NOTES

Effect of Failure to Object. —

In accord with original. See Macon v. Edinger, 49 N.C. App. 620, 272 S.E.2d 411 (1980), cert. granted, — N.C. —, 277 S.E.2d 69 (1981).

"Mistake, Fraud or Collusion." — Since an opportunity for correcting ordinary error or irregularities is provided to a party by the filing of exceptions under this section and by appeal from the decree of confirmation in § 1-272, it should be clear that the legislature did not intend the word "mistake" in this section to apply to ordinary error and irregularities by the commissioner or the clerk, but rather the words "mistake, fraud or collusion" in the statute construed in pari materia are applicable to substantial defects or omissions in the proceedings which probably would not be discovered in time to assert rights within the 10-day limit for filing exceptions to the report of commissioners or appeal from the confirmation order, and which would likely result in the denial of a substantial right if not corrected. Macon v. Edinger, 49 N.C. App. 620, 272 S.E.2d 411 (1980), cert. granted, — N.C. —, 277 S.E.2d 69 (1981).

Lack of Actual Notice. — Where mistake is alleged, the similarity of the language in this section and § 1A-1, Rule 60 indicates that under either section the lack of actual notice is an appropriate basis for impeachment. Macon v. Edinger, 49 N.C. App. 620, 272 S.E.2d 411 (1980), cert. granted, — N.C. —, 277 S.E.2d 69 (1981).

The failure to give respondents actual notice of the entry of the report of the commissioners in a partition proceeding was a "mistake" under both this section and § 1A-1, Rule 60(b), and respondents were entitled to have the clerk's confirmation order set aside pursuant to this section if they had no actual notice of and no opportunity to file exceptions to the commissioners' report, either because of the failure of the clerk to mail the report to them as required by § 1A-1, Rule 5(b), or because mail delivery was not made to them. Macon v. Edinger, 49 N.C. App. 620, 272 S.E.2d 411 (1980), cert. granted, — N.C. —, 277 S.E.2d 69 (1981).

Applied in Hewett v. Hewett, 38 N.C. App. 37, 247 S.E.2d 23 (1978).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

CASE NOTES

Partition in Kind Is Favored over Sale. — A tenant in common is entitled, as a matter of right, to a partition in kind if it can be accomplished equitably. That is to say, partition in kind is favored over sale of the land for division. Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

The burden is upon those opposing a partition in kind to establish the necessity of a sale. Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

By "injury" to a cotenant is meant, etc. — In accord with original. See Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

Test Is Whether Value of Share, etc. — In accord with original. See Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

Insubstantial Impairment of Rights of Cotenants. — A $2,100 dimunition in value, or $1,050 per cotenant, is not a substantial or material impairment of the rights of the cotenants in property worth $280,000, so that an actual partition would be unconscionable. Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

Findings of Trial Judge Are Conclusive. — The findings of the trial judge with regard to whether there should be a partition in kind or sale are conclusive and binding if supported by competent evidence; the judge has discretion in making the determination, and his decision will not be disturbed absent some error of law. Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

Applied in Meachem v. Boyce, 35 N.C. App. 506, 241 S.E.2d 880 (1978).

§ 46-23. Remainder or reversion sold for partition; outstanding life estate.

CASE NOTES

Life Estate with Power of Sale. — A power of sale granted a life tenant by implication creates an exception to the right of partition set out in this section. Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980).

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property because a lien or liens remain unsatisfied on the property to be conveyed. In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The purchaser shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) If the purchaser proves by a preponderance of the evidence that:

(1) A lien remains unsatisfied on the property to be conveyed;
(2) The purchaser has not agreed in writing to assume the lien;
(3) The lien will not be satisfied out of the proceeds of the sale; and
(4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any moneys or security to the purchaser tendered pursuant to his offer.

(d) The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien. (1977, c. 833, s. 1.)

Editor's Note. — Session Laws 1977, c. 833, s. 4, provides: "This act shall become effective October 1, 1977, but shall not affect pending litigation."

§ 46-28.2. When confirmation order final.

After the order of confirmation has been entered, the successful bidder may immediately purchase the property upon which he bid; and upon the exercise of such election, the order of confirmation shall become final. (1977, c. 833, s. 3.)

Editor's Note. — Session Laws 1977, c. 833, s. 4, provides: "This act shall become effective October 1, 1977, but shall not affect pending litigation."

§ 46-33. Shares in proceeds to cotenants secured.

At the time that the order of confirmation becomes final, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale. (1868-9, c. 122, s. 31; Code, s. 1921; Rev., s. 2513; C. S., s. 3244; 1977, c. 833, s. 2.)

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, substituted "At the time that the order of confirmation becomes final" for "Upon confirmation of the report" at the beginning of the section.

Session Laws 1977, c. 833, s. 4, provides in part that the act shall not affect pending litigation.

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

CASE NOTES

The appropriate procedure for a tenant in common seeking a division of personal property is to file a petition in the superior court for that purpose pursuant to this section. Parslow v. Parslow, 47 N.C. App. 84, 266 S.E.2d 746 (1980).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

Sec.

47-3. Commissioner appointed by clerk for nonresident maker.
47-5. When seal of officer necessary to probate.
47-9. Probates before stockholders in building and loan associations.
47-12. Proof of attested instrument by subscribing witness.
47-12.1. Proof of attested instrument by proof of handwriting.
47-13. Proof of unattested writing.

Article 2.

Registration.

47-17.1. Documents registered or ordered to be registered in certain counties to designate draftsman; exceptions.
47-27. Deeds of easements.
47-30. Plats and subdivisions; mapping requirements.
47-32. Photographic copies of plats, etc.
47-32.2. Violation of § 47-30 or 47-32 a misdemeanor.

Article 3.

Forms of Acknowledgment, Probate and Order of Registration.

Sec.

47-38. Acknowledgment by grantor.
47-39. [Repealed.]

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

47-50. Order of registration omitted.
47-71.1. Corporate seal omitted prior to January, 1981.
47-108.11. Validation of recorded instruments where seals have been omitted.

Article 6.

Execution of Powers of Attorney.

47-115.1. Appointment of attorney-in-fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.

ARTICLE 1.

Probate.

§ 47-2. Officials of the United States, foreign countries, and sister states.

CASE NOTES

Cited in DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

§ 47-3. Commissioner appointed by clerk for nonresident maker.

When it appears to the clerk of the superior court of any county that any person nonresident of this State desires to acknowledge a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he may issue a commission to a commissioner for receiving such acknowledgment, or taking such proof. The commissioner shall make certificate of acknowledgment or proof and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved and shall order the same to be registered. (1869-70, c. 185; Code, s. 1258; Rev., s. 991; C. S., s. 3295; 1945, c. 73, s. 9; 1977, c. 375, s. 12.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, deleted "and said commissioner may likewise take the acknowledgment and take such proof as to a married woman" from the end of the first sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-5. When seal of officer necessary to probate.

When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the register of deeds of the county in which the instrument is to be registered, the official seal shall not be necessary. (1899, c. 235, s. 8; Rev., s. 993; C. S., s. 3297; 1969, c. 664, s. 3; 1977, c. 375, s. 12.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, deleted "married woman or other" preceding "person or corporation" in the first sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-9. Probates before stockholders in building and loan associations.

No acknowledgment or proof of execution of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment or proof is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments or proofs. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this State. Acknowledgments and proofs of execution, including private examinations of any married woman taken before March 20, 1939, by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. (1913, c. 110, ss. 1, 3; C. S., s. 3301; 1939, c. 136; 1977, c. 375, s. 12.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, deleted "including the privy examination of any married woman" following "proof of execution" in the first sentence, substituted "or proof" for "proof or privy examination" in the first sentence, and substituted "or proofs" for "proofs and privy examinations" at the end of the second sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-12. Proof of attested instrument by subscribing witness.

Except as provided by G.S. 47-12.2, the execution of any instrument required or permitted by law to be registered, which has been witnessed by one or more subscribing witnesses, may be proved for registration before any official authorized by law to take proof of such an instrument, by a statement under oath of any such subscribing witness that the maker either signed the instrument in his presence or acknowledged to him the execution thereof. Nothing in this section in anywise affects any of the requirements set out in G.S. 52-10 or 52-10.1. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1; 1953, c. 1078, s. 1; 1977, c. 375, s. 12.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-12" at the end of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-12.1. Proof of attested instrument by proof of handwriting.

(b) Nothing in this section in anywise affects any of the requirements set out in G.S. 52-10 or 52-10.1. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1; 1977, c. 375, s. 12.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-12" at the end of subsection (b).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Only Part of Section Set Out. — As subsection (a) was not changed by the amendment, it is not set out.

§ 47-13. Proof of unattested writing.

If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker and this shall likewise apply to proof of execution of instruments by married persons. (1899, c. 235, s. 11; Rev., s. 998; C. S., s. 3304; 1945, c. 73, s. 12; 1977, c. 375, s. 12.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "persons" for "women" at the end of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-14. Register of deeds to pass on certificate and register instruments; order by judge; instruments to which register of deeds is a party.

CASE NOTES

Cited in Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

§ 47-14.1. Repeal of laws requiring private examination of married women.

Legal Periodicals. — For comment on the constitutionality of the privy examination under former § 52-6(a) and its relation to this section, see 12 Wake Forest L. Rev. 1007 (1977).

ARTICLE 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

CASE NOTES

Improperly Acknowledged Deed Held Invalid. — Where a deed was not properly acknowledged in that the grantors did not actually appear before the notary public as recited on the face of the deed, the deed was invalid and, therefore, not admissible in evidence to prove an essential link in the record chain. Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

§ 47-17.1. Documents registered or ordered to be registered in certain counties to designate draftsman; exceptions.

The register of deeds of any county in North Carolina shall not accept for registration, nor shall any judge order registration pursuant to G.S. 47-14, of any deeds or deeds of trust, executed after January 1, 1980, unless the first page of the deeds or deeds of trust bears an entry showing the name of either the person or law firm who drafted the instrument, except that papers or documents prepared in other states may be registered or ordered to be registered without having the name of either the person or law firm who drafted the instrument designated thereon. (1953, c. 1160; 1955, cc. 54, 59, 87, 88, 264, 280, 410, 628, 655; 1957, cc. 431, 469, 932, 982, 1119, 1290; 1959, cc. 266, 312, 548, 589; 1961, cc. 789, 1167; 1965, cc. 160, 597, 830; 1967, cc. 42, 139; c. 639, s. 2; c. 658; 1969, c. 10; 1971, c. 46; 1973, cc. 65, 283, 342; 1979, c. 703; 1981, c. 362, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section.

The 1981 amendment, applicable to all documents presented for registration on or after May 12, 1981, substituted "either the person or law firm who drafted the instrument" for "the draftsman of the instrument" near the middle of the section and for "the draftsman" near the end of the section.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

Legal Periodicals.—For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

CASE NOTES

I. IN GENERAL.

Applied in Cities Serv. Oil Co. v. Pochna, 30 N.C. App. 360, 226 S.E.2d 884 (1976); Hill v. Pinelawn Mem. Park, 50 N.C. App. 231, 275 S.E.2d 838 (1981).

IV. RIGHTS OF PERSONS PROTECTED.

Heir Not Protected. — The recording act protects only creditors of the grantor, bargainor, or lessor, and purchasers for value, against an unregistered conveyance of land. The same reasoning which prevents a party from introducing into evidence against a lien creditor or purchaser for value a deed invalidly registered does not apply to exclude an invalidly registered deed introduced against a party claiming interest to the land by descent. An heir is not a purchaser for value entitled to the protection of the recording act. Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

§ 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration.

Legal Periodicals. — For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

§ 47-26. Deeds of gift.

CASE NOTES

Applied in Penninger v. Barrier, 29 N.C. App. 312, 224 S.E.2d 245 (1976); High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661 (1979).

Cited in Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979).

§ 47-27. Deeds of easements.

All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights-of-way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within 90 days after the beginning of the use of the easements granted thereby. If after 90 days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after 10 days' notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

(1) It shall not apply to any deed or instrument executed prior to January 1, 1910.

(2) It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this section.

(3) It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

(4) It shall not apply to local telephone companies, operating exclusively within the State, or to agreements about alleyways.

The failure of electric companies or power companies operating exclusively within this State or electric membership corporations, organized pursuant to Chapter 291 of the Public Laws of 1935 [G.S. 117-6 through 117-27], to record any deeds or agreements for rights-of-way acquired subsequent to 1935, shall not constitute any violation of any criminal law of the State of North Carolina.

No deed, agreement for right-of-way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.

From and after July 1, 1959, the provisions of this section shall apply to require the Department of Transportation to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements. (1917, c. 148; 1919, c. 107; C. S., s. 3316; 1943, c. 750; 1959, c. 1244; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, substituted "Department of Transportation" for "Board of Transportation" in the last paragraph.

§ 47-30. Plats and subdivisions; mapping requirements.

(a) Size Requirements. — All land maps presented to the register of deeds for recording in the registry of a county in North Carolina after January 1, 1960, shall have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and one-half inch border on each of the other sides. Where size of land areas, or suitable scale to assure legibility require, maps may be placed on two or more sheets with appropriate match lines. All counties currently operating under the statutes or other laws setting forth regulatory size will be allowed to continue to use such sizes as are currently in use until June 30, 1963, on or before which time they shall modify their size to conform to those shown above.

(b) Maps to Be Reproducible. — Each map presented for recording shall be a reproducible map in cloth, linen, film or other permanent material and submitted in this form. Recorded maps shall be maintained in map files, unless the filing officer makes a permanent master copy thereof by a process from which a direct copy can be made, in which event the original map may be returned to the person offering it for recordation after it has been properly recorded and indexed. A direct or photographic copy of each recorded map shall be placed in the map book maintained for that purpose and properly indexed for use. All filing officers are authorized to make permanent master copies of maps that have been recorded and filed before July 1, 1971, and may return the originals to the person offering them for recordation.

(c) Information Contained in Title of Map. — The title of each map shall contain the following information: property designation, name of owner, location to include township, county and State, the date or dates the survey was made; scale in feet per inch in words or figures and bar graph; name, address, registration number and seal of engineer or surveyor.

(d) Certificate; Form. — There shall appear on each map a certificate by the person making the survey, or on each map where no survey was made, or a certificate by the person under whose supervision such survey or such map was made, stating the origin of the information shown on the map, including deeds and any recorded data shown thereon. If a complete survey was made, the error of closure as calculated by latitudes and departures must be shown. Any lines on the map that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. The execution of such certificate shall be acknowledged before any officer authorized to take acknowledgments by the person preparing the map. All maps to be recorded shall be probated as required by law for the registration of deeds.

The certificate required above shall include the source of information for the survey and data indicating the accuracy of closure of the map, and shall be in substantially the following form: "I . . . ., certify that this map was (drawn by me) (drawn under my supervision) from (an actual survey made by me) (an actual survey made under my supervision) (deed description recorded in Book . . . ., page . . . ., Book . . . ., page . . . ., etc.) (other); that the error of closure as calculated by latitudes and departures is 1: . . . .; that the boundaries not surveyed are shown as broken lines plotted from information found in Book . . . ., page . . . .; that this map was prepared in accordance with G.S. 47-30 as amended. Witness my hand and seal this . . . . day of . . . ., A.D., 19. . . ..

. . . .
Surveyor or Engineer"

Failure of the surveyor to comply with the requirements of this statute shall not preclude recordation provided that the officer accepting the map for recordation shall require the presence on the map of the surveyor's seal and the surveyor's certificate of acknowledgment.

(e) Showing Method of Computation. — If area of land parcels is shown, the method of computation used by the surveyor must be shown. Area "by estimation" is not acceptable, nor is the area copied from another source.

(f) Map to Contain Specific Information. — Every map shall contain the following specific information:

(1) An accurately positioned north arrow coordinated with any bearings shown on the map. Indication shall be made as to whether the north index is true, magnetic or grid.

(2) The azimuth or courses and distances as surveyed of every line shall be shown including offset lines where actually used in the field. Distances shall be in feet and decimals thereof; other units of measure may be placed in parentheses if desired.

(3) All map lines shall be by horizontal (level) measurements. All information shown on the map shall be correctly plotted to the scale shown. Enlargement of portions of a map are acceptable in the interest of clarity, where shown as inserts on the same sheet.

(4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature of the curve to the point of tangent shall be shown as standard curve data, or as a traverse of chords around the curve.

(5) Where a subdivision of land is set out on the map, all streets and lots shall be carefully plotted with dimension lines indicating widths and all other pertinent information necessary to reestablish in the field.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3 and 39-32.4, as amended, the location and

pertinent information as required in the reference statute shall be plotted on the map. All other corners which are marked by monument or natural object shall be so identified on all maps, and all corners of adjacent owners in the boundary lines of the subject tract which are marked by monument or natural object must be shown with a distance from one or more of the subject tract's corners.

(7) The names of adjacent landowners and lot block and subdivision designations shall be shown where they have been determined and verified by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown, and locating, offset or traverse lines shall be plotted in broken lines with azimuths or courses and distances shown on the map.

(9) Where the map is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to a monument of some United States or State Agency Survey System, such as the United States Coast and Geodetic Survey Systems, where such monument is within 2,000 feet of said corner. Where the North Carolina Grid System coordinates of said monument have been published by the North Carolina Department of Natural Resources and Community Development, the coordinates of the referenced corner shall be computed and shown in X and Y ordinates on the map. Where such a monument is not available, the tie shall be made to some pertinent and permanent recognizable landmark or identifiable point.

(g) Recording of Map. — A map, when proven and probated as provided herein as deeds and other conveyances, when presented for recording, shall be recorded in the Map Book and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any map herein authorized shall have the same effect as if the description of the lands as indicated on the record of the map were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the recording of any map made prior to January 1, 1960.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded map.

(j) The provisions of this section shall not apply to boundary maps of areas annexed by municipalities nor to maps of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Anson, Beaufort, Camden, Clay, Franklin, Granville, Greene, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, McDowell, Martin, Mitchell, Northampton, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Richmond, Robeson, Scotland, Surry, Swain, Vance, Warren, Washington and Yadkin.

(l) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4. (1911, c. 55, s. 2; C. S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479.)

Local Modification. — Ashe: 1979, c. 330, ss. 2, 3; Onslow: 1977, c. 305, s. 1.

Effect of Amendments. — The first 1977 amendment, effective July 1, 1977, deleted "Lenoir," the second 1977 amendment deleted "Tyrrell," and the third 1977 amendment, effective July 1, 1977, deleted "Sampson," in subsection (k).

The fourth 1977 amendment substituted "Natural Resources and Community Development" for "Natural and Economic Resources" in subdivision (9) of subsection (f).

The 1979 amendment, effective May 10, 1979, deleted "Ashe" in subsection (k).

Session Laws 1977, c. 771, s. 22, contains a severability clause.

The first 1981 amendment deleted "Cherokee" in subsection (k). Session Laws 1981, c. 138, s. 2, provides: "This act is effective upon ratification and applies to maps presented to the Cherokee County Register of Deeds or filed in a special proceeding on or after that date." The act was ratified March 27, 1981.

The second 1981 amendment, effective July 1, 1981, deleted "Caswell," in subsection (k). Session Laws 1981, c. 140, s. 2, provides: "This act shall become effective July 1, 1981 and shall apply to maps presented to the Caswell County Register of Deeds or filed in a special proceeding on and after that date."

The third 1981 amendment, effective July 1, 1981, deleted "Brunswick," in subsection (k).

§ 47-30.1. Plats and subdivisions; alternative requirements.

Local Modification. — Yadkin: 1977, c. 480.

§ 47-32. Photographic copies of plats, etc.

After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2; 1981, c. 138, s. 1; c. 140, s. 1.)

Effect of Amendments. — The first 1977 amendment deleted Lenoir and the second 1977 amendment deleted Tyrrell in the list of counties in the second paragraph.

The first 1981 amendment deleted Cherokee in the list of counties in the second paragraph. Session Laws 1981, c. 138, s. 2, provides: "This act is effective upon ratification and applies to maps presented to the Cherokee County Register of Deeds or filed in a special proceeding on or after that date." The act was ratified March 27, 1981.

The second 1981 amendment, effective July 1, 1981, deleted Caswell in the list of counties in the second paragraph. Session Laws 1981, c. 140, s. 2, provides: "This act shall become effective July 1, 1981 and shall apply to maps presented to the Caswell County Register of Deeds or filed in a special proceeding on or after that date."

§ 47-32.2. Violation of § 47-30 or 47-32 a misdemeanor.

Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3; 1981, c. 138, s. 1; c. 140, s. 1.)

Effect of Amendments. — The first 1977 amendment deleted Lenoir and the second 1977 amendment deleted Tyrrell in the list of counties in the second paragraph.

The first 1981 amendment deleted Cherokee in the list of counties in the second paragraph. Session Laws 1981, c. 138, s. 2, provides: "This act is effective upon ratification and applies to maps presented to the Cherokee County Register of Deeds or filed in a special proceeding on or after that date." The act was ratified March 27, 1981.

The second 1981 amendment, effective July 1, 1981, deleted Caswell in the list of counties in the second paragraph. Session Laws 1981, c. 140, s. 2, provides: "This act shall become effective July 1, 1981 and shall apply to maps presented to the Caswell County Register of Deeds or filed in a special proceeding on or after that date."

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-38. Acknowledgment by grantor.

Where the instrument is acknowledged by the grantor or maker, the form of acknowledgment shall be in substance as follows:

North Carolina, ... County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the grantor or maker) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the . . . . day of . . . . (year).

(Official seal.)

. . . .

(Signature of officer.)

(Rev., s. 1002; C. S., s. 3323; 1945, c. 73, s. 13; 1977, c. 375, s. 12.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, deleted "or where a married woman is a grantor or maker" following "acknowledged by the grantor or maker" near the beginning of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 47-39: Repealed by Session Laws 1977, c. 375, s. 16, effective January 1, 1978.

Editor's Note. — Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-50. Order of registration omitted.

In all cases prior to December 31, 1980, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of the State of North Carolina, and the clerk of the superior court of such county or other officer authorized to pass upon acknowledgments and to order registration of instruments has failed either to adjudge the correctness of the acknowledgment or to order the registration thereof, or both, such registrations are hereby validated and the instrument so appearing in the office of the register of deeds of such county shall be effective to the same extent as if the clerk or other authorized officer had properly adjudged the correctness of the acknowledgment and had ordered the registration of the instrument. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C. S., s. 3332; 1941, cc. 187, 229; 1949, c. 493; 1957, c. 314; 1961, c. 79; 1981, c. 812.)

Effect of Amendments. — The 1981 amendment substituted "1980" for "1960" near the beginning of the section.

§ 47-71.1. Corporate seal omitted prior to January, 1981.

Any corporate deed, or conveyance of land in this State, made prior to January 1, 1981, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538; 1981, c. 191, s. 1.)

Effect of Amendments. — The 1977 amendment substituted "January 1, 1975" for "January 1, 1973."

The 1981 amendment substituted "January 1, 1981" for "January 1, 1975." Session Laws 1981, c. 191, s. 2, provides that the act does not affect pending litigation.

CASE NOTES

Cited in Philbin Invs., Inc. v. Orb Enterprises, Ltd., 35 N.C. App. 622, 242 S.E.2d 176 (1978).

§ 47-81.2. Before army, etc., officers.

CASE NOTES

Use of Section to Validate Separation Agreement Precluded. — Where a wife's acknowledgment of a separation agreement was fatally defective under former § 52-6 because there was no private examination of the wife and thus no finding as to whether the agreement was unreasonable or injurious to the wife, and because the acknowledgment was certified by a Judge Advocate in the Marine Corps who did not qualify as a "certifying officer" under former § 52-6(c) since his position was not that of an "equivalent or corresponding officer" of the jurisdiction where the examination and acknowledgment were to be made, the omission of the private examination and the lack of authority on the part of the certifying officer precluded the use of curative statutes, § 52-8 and this section, to validate the agreement. DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

§ 47-108.11. Validation of recorded instruments where seals have been omitted.

In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1980, or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1.)

Effect of Amendments. — The 1977 amendment substituted "1977" for "1974" in the second paragraph.

The 1979, 2nd Sess., amendment substituted "1980" for "1977" in the second paragraph.

Session Laws 1979, 2nd Sess., c. 1185, s. 2, provides: "This act is effective upon ratification, but does not affect pending litigation."

ARTICLE 6.

Execution of Powers of Attorney.

§ 47-115.1. Appointment of attorney-in-fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.

(a) Any person 18 years of age or more and mentally competent may as principal execute a power of attorney pursuant to the provisions of this section which shall continue in effect until revoked as hereinafter provided, notwithstanding any incapacity or mental incompetence of such principal which occurs after the date of the execution and acknowledgment of the power of attorney.

(k) In the event that any power of attorney executed pursuant to the provisions of this section does not contain the amount of commissions that the attorney-in-fact is entitled to receive or the way such commissions are to be determined, and the principal should thereafter become incompetent, the commissions such attorney-in-fact shall receive shall be fixed in the discretion of the clerk of superior court pursuant to the provisions of G.S. 32-50(c). (1961, c. 341, s. 1; 1967, c. 1087; 1971, c. 197; c. 1231, s. 1; 1977, c. 814, s. 6.)

Editor's Note. — Subsection (a) is set out above to correct a typographical error in the Replacement Volume.

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 32-50(c)" for "G.S. 28-170" at the end of subsection (k).

Only Part of Section Set Out. — As the rest of the section was not changed, only subsections (a) and (k) are set out.

Legal Periodicals. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

CASE NOTES

Purpose of Written Power of Attorney. — If the act of an agent is one which requires authority in writing (such as a power of attorney, under this section), those dealing with him are charged with notice of that fact and of any limitation or restriction on the agent contained in such written authority, for the principal is bound only to the extent of that authority. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

The purpose of requiring a written power of attorney is to put persons on notice of the terms and conditions of the power granted in the written document. North Carolina Nat'l Bank v. Hammond, 40 N.C. App. 34, 252 S.E.2d 104, rev'd on other grounds, 298 N.C. 703, 260 S.E.2d 617 (1979).

Applied in North Carolina Nat'l Bank v. Hammond, 298 N.C. 703, 260 S.E.2d 617 (1979).

Chapter 47A.

Unit Ownership Act.

Sec.
47A-14. [Repealed.]
47A-14.1. Deeds conveying units.
47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.

§ 47A-1. Short title.

Legal Periodicals. — For article entitled "Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations," see 12 Wake Forest L. Rev. 915 (1976).

For comment on areas of dispute in condominium law, see 12 Wake Forest L. Rev. 979 (1976).

§ 47A-14: Repealed by Session Laws 1981, c. 527, s. 1, effective October 1, 1981.

Cross References. — For present provisions as to deeds conveying units, and for validation of conveyances not complying with this section, see § 47A-14.1.

§ 47A-14.1. Deeds conveying units.

(a) Any conveyance of a condominium unit executed on or after October 1, 1981, which complies with the general requirements of the laws of this State concerning conveyances of real property shall be valid.

(b) All conveyances of condominium units executed before October 1, 1981, which comply with the general requirements of the laws of this State concerning conveyances of real property shall be valid even though such conveyances failed to comply with one or more of the particulars set out in former G.S. 47A-14. (1981, c. 527, ss. 2, 3.)

Editor's Note. — Session Laws 1981, c. 527, s. 4, makes the act effective Oct. 1, 1981.

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.

(a) There shall be attached to the declaration, at the time it is filed for record, a full and exact copy of the plans of the building, which copy of plans shall be entered of record along with the declaration. Said plans shall show graphically all particulars of the building, including, but not limited to, the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, stating the name of the building or that it has no name, area and location of the common areas and facilities affording access to each unit, and such plans shall bear the verified statement of a registered architect or licensed professional engineer certifying that it is an accurate copy of portions of the plans of the building as filed with and approved by the municipal or other governmental subdivision having jurisdiction over the issuance of permits for the construction of buildings. If such plans do not include a verified statement by such architect or engineer that such plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built, there shall be recorded prior to the first conveyance of any unit an amendment to the declaration to which shall be attached a verified statement of a registered architect or licensed professional engineer certifying that the plans theretofore filed, or being filed simultaneously with such amendment, fully depict the layout, ceiling and floor elevations, unit numbers and dimensions of the units as built. Such plans shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to record, numbered serially in the order of receipt, each designated "Unit Ownership," with the name of the building, if any, and each containing a reference to the book and page numbers and date of the recording of the declaration.

(b) In order to be recorded, plans filed for recording pursuant to subsection (a) shall:

(1) Be reproducible plans on cloth, linen, film or other permanent material and be submitted in that form; and

(2) Have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and a one-half inch border on each of the other sides. Where size of the buildings, or suitable scale to assure legibility require, plans may be placed on two or more sheets with appropriate match lines.

(c) The fee for recording each plan sheet submitted pursuant to subsection (a) shall be as prescribed by G.S. 161-10(a)(3). (1963, c. 685, s. 15; 1981, c. 587.)

Effect of Amendments. — The 1981 amendment, effective Jan. 1, 1982, and applicable to all plans filed for recording on and after that date, designated the former provisions of this section as subsection (a) and added subsections (b) and (c).

§ 47A-19. Bylaws; contents.

Legal Periodicals. — For article discussing the problem of potentially unlimited liability of a condominium owner for damages resulting from incidents in the common areas of the condominium, see 50 N.C.L. Rev. 1 (1971).

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Legal Periodicals. — For article discussing the problem of potentially unlimited liability of a condominium owner for damages resulting from incidents in the common areas of the condominium, see 50 N.C.L. Rev. 1 (1971).

Chapter 47B.

Real Property Marketable Title Act.

Sec.
47B-1. Declaration of policy and statement of purpose.
47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

§ 47B-1. Declaration of policy and statement of purpose.

It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:

(1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.

(2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

(3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.

(4) Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only.

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished. (1973, c. 255, s. 1.)

Editor's Note. — This section is set out to correct a typographical error in the last paragraph of the section as it appears in the Replacement Volume.

Legal Periodicals. — For survey of 1976 case law on property, see 55 N.C.L. Rev. 1069 (1977).

For an article entitled, "The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation," see 11 N.C. Cent. L.J. 362 (1980).

CASE NOTES

This Chapter does not affect the presumption in favor of the State set forth in § 146-79 relating to land controversies wherein the State is a party. Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

(a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.

(b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:

(1) The person claiming such estate; or

(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;

with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

(c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

(d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establishment of a marketable record title in any person pursuant to this statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title. (1973, c. 255, s. 1; c. 881; 1981, c. 682, s. 11.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, moved the language beginning "with nothing appearing of record" to its present position at the end of subsection (b) from its former position at the end of subdivision (2) of subsection (b).

§ 47B-3. Exceptions.

Legal Periodicals. — For note discussing effect of exceptions to the thirty-year limitation, see 52 N.C.L. Rev. 211 (1973).

For survey of 1976 case law on property, see 55 N.C.L. Rev. 1069 (1977).

For an article entitled, "The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation," see 11 N.C. Cent. L.J. 362 (1980).

CASE NOTES

Applied in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

Chapter 48.

Adoptions.

Sec.
48-2. Definitions.
48-4. Who may adopt children.
48-5. When parent is not necessary party to adoption proceedings.
48-6. When consent of parents not necessary.
48-6.1. [Repealed.]
48-9. When consent may be given by persons other than parents.
48-13. Reference to parental status.
48-25. Record and information not to be made public; violation a misdemeanor.

Sec.
48-36. Adoption of persons who are 18 or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.
48-37. Compensation for placing or arranging placement of child for adoption prohibited.
48-38. Advertisements soliciting children for adoption prohibited.
48-39 to 48-39.2. [Repealed.]

§ 48-1. Legislative intent; construction of Chapter.

Legal Periodicals. — For comment on "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

CASE NOTES

Applied in In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977); Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978); In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

§ 48-2. Definitions.

In this Chapter, unless the context or subject matter otherwise requires —

(1) a. For the purpose of this Chapter, an "abandoned child" shall be any child who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. A child may be willfully abandoned by his or her legal or natural father, within the meaning of this section, if the mother of the child had been willfully abandoned by and was living separate and apart from the father at the time of the child's birth, although the father may not have known of such birth; but in any event said child must be over the age of three months at the time of institution of the action or proceeding to declare the child to be an abandoned child.

b. In addition to the definition of abandonment in (1)a above, an abandoned child, for purposes of this Chapter, shall be a child who has been placed in the care of a child-caring institution or foster home, and whose parent, parents, or guardian of the person has failed substantially and continuously for a period of more than six months to maintain contact with such child, and has willfully failed for such period to contribute adequate support to such child, although physically and financially able to do so. In order to find an abandonment under this subdivision, the court must find the foregoing and the court must also find that diligent but unsuccessful efforts have been made on the part of the institution or a child-placing agency to encourage the parent, parents, or guardian of the person of the child to strengthen the parental or custodial relationship to the child.

(2) "Adult person" means any person who has attained the age of 18 years.
(3) "Biological relative" means the biological parent or parents or biological siblings of an adoptee.
(4) "Licensed child-placing agency" means any agency operating under a license to place children for adoption issued by the Department of Human Resources, or in the event that such agency is in another state or territory or in the District of Columbia, operating under a license to place children for adoption issued by a governmental authority of such state, territory, or the District of Columbia, empowered by law to issue such licenses.
(5) "Parent" means the biological or legal mother or father of a child.
(6) "Readoption" means an adoption by any person of a child who has been previously legally adopted.
(7) "Stepchild" means the child of one spouse by a former union, whether or not such child was born in wedlock. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241; 1969, c. 982; 1971, c. 157, ss. 1, 2; c. 1231, s. 1; 1973, c. 476, s. 138; 1975, c. 321, s. 2; 1977, c. 879, s. 1; 1981, c. 924, s. 1.)

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, added subdivision (6).

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

The 1981 amendment added the definition of "biological relative" and rearranged the subdivisions in this section in order to put the definitions in alphabetical order.

Legal Periodicals. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

CASE NOTES

"Abandonment" Defined. —

In accord with 1st paragraph in original. See In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

Abandonment Must Be Willful. —

In accord with 1st paragraph in original. See In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

Where the respondent's evidence tended to show that he was not aware that the child had been placed in the custody of the Department of Social Services, that he was unable to locate his son, and that as a result of his incarceration, he was unable to make any payments to support the child, the fact that the respondent was unable to locate his son and was unable to make support payments as a result of his incarceration, was inconsistent with a willful intent to abandon his son. In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

A child has been "willfully abandoned" within the meaning of subdivision (3a) of this section when the conduct of the abandoning parent over the six months period reveals a settled purpose and willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child. In re Stroud, 38 N.C. App. 373, 247 S.E.2d 792 (1978).

Mere Failure to Contribute, etc. —

In accord with original. See In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978); In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

But Continued Willful Failure to Support, etc. —

In accord with original. See In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Parent May Not Dissipate Effects, etc. —

Legal abandonment is not a transitory concept that may be recessed at the whim of the transgressor. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Conduct Amounting to Abandonment. —

In accord with original. See In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Failure to Provide for Medical Attention. — Where a child was in need of medical attention and father failed to provide funds or otherwise show concern about his condition, this tends to be some evidence of willful abandonment. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

And Money Sent after Filing of Petition Irrelevant. — Where records indicate that the father sent money for the child's care after the filing of the petition for a declaration of abandonment, these funds are irrelevant to the issue of whether the child had been abandoned as alleged in the petition and, therefore, this evidence would not be admissible. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Parents' Incarceration Does Not Evince Intent to Forego Duties. — The fact that a parent commits a crime which might result in incarceration is insufficient, standing alone, to show a settled purpose to forego all parental duties. In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

The fact that respondent committed the felony of crime against nature, was found guilty and was incarcerated did not evince a willful intent to forego any responsibility to his child. In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

Cited in In re Dinsmore, 36 N.C. App. 720, 245 S.E.2d 286 (1978).

§ 48-4. Who may adopt children.

(e) If the petitioner is the natural parent or the spouse of the natural parent of the minor child, such petitioner may adopt the child even though the petitioner is not 18 years of age. Such petitioner shall be competent to execute the petition without the appointment of a general or testamentary guardian, or by guardian ad litem. (1949, c. 300; 1963, c. 699; 1967, c. 619, ss. 1-3; c. 693; 1971, c. 395; c. 1231, s. 1; 1973, c. 1354, ss. 1-4; 1979, c. 107, s. 6.)

Effect of Amendments. — The 1979 amendment substituted "18" for "21" near the end of the first sentence of subsection (e).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (e) is set out.

§ 48-5. When parent is not necessary party to adoption proceedings.

(a) The court shall be authorized to determine whether the parent or parents of a child shall be necessary parties to any proceeding under this Chapter, and whether the consent of such parent or parents shall be required in accordance with G.S. 48-6 and 48-7.

(b) If the identity of either parent is unknown or if one parent is unwilling to identify the other parent, the determination of whether consent of such parent shall be necessary to the adoption of the child shall be made according to G.S. 48-7(c).

(c) In all cases where a district court has entered an order pursuant to G.S. 7A-288 or Article 24B of Chapter 7A terminating the parental rights with respect to a child adjudicated to be neglected or dependent, the parent whose parental rights with respect to such child may have been terminated shall not be a necessary party to any proceeding under this Chapter nor shall the consent of such parent or parents be required.

(d) In the event that a district court has not heretofore entered an order terminating parental rights as provided for in G.S. 7A-288 or Article 24B of Chapter 7A, then on written notice of not less than 10 days to the parent, parents, or guardian of the person, the court in the adoption proceeding is hereby authorized to determine whether an abandonment as defined in G.S. 48-2(1)a and (1)b has taken place.

(e) If the parent, parents, or guardian of the person deny that an abandonment has taken place, this issue of fact shall be determined as provided in G.S. 1-273, and if abandonment is determined, then the consent of the parent, parents, or guardian of the person shall not be required. Upon final determination of this issue of fact the proceeding shall be transferred back to the special proceedings docket for further action by the clerk.

(f) A copy of the order terminating parental rights or a copy of the order declaring a child abandoned as provided in subsections (d) and (e) must be filed in the proceeding with the petition in which case consent must be given or withheld in accordance with G.S. 48-9, subsection (a)(2) or subsection (a)(3). (1949, c. 300; 1957, c. 90; c. 778, s. 3; 1971, c. 1185, s. 17; 1975, c. 321, s. 1; 1977, c. 879, s. 2; 1979, c. 107, s. 7.)

Editor's Note. — Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

Section 7A-288, referred to in subsections (c) and (d) of this section, has been repealed. For present provisions as to termination of parental rights, see § 7A-289.22 et seq.

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, redesignated former subsections (a) through (d) as subsections (c) through (f) and added present subsections (a) and (b).

The 1979 amendment inserted the references to Article 24B of Chapter 7A in subsections (c) and (d).

OPINIONS OF ATTORNEY GENERAL

The putative father of a child born out of wedlock is entitled to notice prior to a judicial determination as to whether his written consent to the adoption of the child is required. Opinion of Attorney General to Mr. Robert H. Ward, Director, N.C. Division of Social Services, 47 N.C.A.G. 132 (1977).

§ 48-6. When consent of parents not necessary.

(a) The court shall determine whether the parent or parents of a child must give written consent to adoption of said child in accordance with the following provisions:

(1) If a parent who has been served with notice pursuant to G.S. 48-7 fails to appear at the hearing by the date and time specified in the notice, and has not given a written consent to adoption, the clerk shall enter an order with supporting findings of fact allowing the adoption to proceed without the said parent's consent.

(2) If a putative father appears at the hearing and cannot establish a parental right in accordance with subsection (3) below as to why his consent should be necessary, the court shall enter an order with supporting findings of fact allowing the adoption to proceed without the said putative father's consent.

(3) In the case of a child born out of wedlock the consent of the putative father shall not be required unless prior to the filing of the adoption petition:

a. Paternity has been judicially established or acknowledged by affidavit which has been filed in a central registry maintained by the Department of Human Resources; provided, the court shall inquire of the Department of Human Resources as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. The child has been legitimated either by marriage to the mother or in accordance with provisions of G.S. 49-10, a petition for legitimation has been filed; or

c. The putative father has provided substantial financial support or consistent care with respect to the child and mother.

(a1) If a putative father of a child executes an affidavit denying paternity or executes a waiver of any and all rights to said child, including the right to notice of adoption, his consent shall not be required and he shall not be a necessary party to any proceeding under this Chapter, and the court shall enter an order to this effect.

(1977, c. 879, s. 3; 1979, 2nd Sess., c. 1088, s. 1.)

Cross References. —
For provisions relating to the termination of parental rights, see § 7A-289.22 et seq.

Effect of Amendments.—The 1977 amendment, effective Oct. 1, 1977, rewrote subsection (a) and added subsection (a1).

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

The 1979, 2nd Sess., amendment, ratified June 16, 1980, and effective 90 days after ratification, added in subdivision (a)(3)a the language beginning "which has been filed" and ending "certified reply."

Only Part of Section Set Out. — As subsection (b) was not changed by the amendments, it is not set out.

§ 48-6.1: Repealed by Session Laws 1977, c. 879, s. 4, effective October 1, 1977.

Cross References. — For provisions specifying when consent of parents is not necessary, see § 48-6.

§ 48-9. When consent may be given by persons other than parents.

(a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person:

(1) When the parent, parents, or guardian of the person of the child has in writing surrendered the child to a director of social services of a county or to a licensed child-placing agency and at the same time in writing has consented generally to adoption of the child, the director of social services or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county director of social services may accept the surrender of a child regardless of its place of birth or the residence of the parent or parents.

(2) If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county director of social services of the county in which the child resides to act in the proceeding as guardian ad litem of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.

(3) When a district court has entered an order terminating parental rights as provided by G.S. 7A-288, and when the court has placed such child in the custody of the county department of social services or a licensed child-placing agency, then the director of such county department of social services or the executive director of such licensed child-placing agency shall have the right to give written consent to the adoption of such child without being appointed as guardian ad litem of the child.

(1977, c. 879, s. 5.)

Editor's Note. — Section 7A-288, referred to in subdivision (a)(3) of this section, has been repealed. For present provisions as to termination of parental rights, see § 7A-289.22 et seq.

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, substituted "regardless of its place of birth or the residence of the parent or parents" for "who was born in the county or whose parent or parents have established residence in the county" at the end of the second sentence of subdivision (1) of subsection (a).

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Or Court May Order Adoption, etc. — In accord with second paragraph in original. See Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 570, 272 S.E.2d 417 (1980), cert. granted, — N.C. —, 274 S.E.2d 230 (1981).

§ 48-9.1. Additional effects of surrender and consent given to director of social services or to licensed child-placing agency; custody of child; disposition of certain unadoptable children.

CASE NOTES

Consent Not Wrongfully Withheld. — The trial court erred in placing the child in question with petitioners for the purpose of adoption, since adoptions are permitted only upon the statutory procedure set out in this chapter, and, pursuant thereto, adoption is by a special proceeding before the clerk of superior court; moreover, there was no evidence to support the trial court's finding that the department of social services, which had custody of the child, "wrongfully and unreasonably withheld its consent for adoption." In re Sloop, 50 N.C. App. 201, 272 S.E.2d 611 (1980).

Rights of Foster Parents. — Foster parents had no standing to bring an action for permanent custody of a child temporarily placed with them by the county department of social services where the rights of the child's natural parents had been surrendered to the department of social services, and the department had legal custody of the child and the right to place the child for adoption. Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 570, 272 S.E.2d 417 (1980), cert. granted, — N.C. —, 274 S.E.2d 230 (1981).

Applied in Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Stated in In re Norwood, 43 N.C. App. 356, 258 S.E.2d 869 (1979).

§ 48-12. Nature of proceeding; venue.

CASE NOTES

Statutory Procedure Mandatory. — The trial court erred in placing the child in question with petitioners for the purpose of adoption, since adoptions are permitted only upon the statutory procedure set out in this chapter, and, pursuant thereto, adoption is by a special proceeding before the clerk of superior court; moreover, there was no evidence to support the trial court's finding that the department of social services, which had custody of the child, "wrongfully and unreasonably withheld its consent for adoption." In re Sloop, 50 N.C. App. 201, 272 S.E.2d 611 (1980).

Jurisdiction over Custody Matters Not Exclusively Vested in Clerk. — In an adoption proceeding, the fact that the child had been placed by its mother with the department of social services and that the mother had signed a general consent for his adoption, did not vest subject matter jurisdiction over all matters pertaining to the child's custody exclusively in the clerk of superior court or in the superior court itself. Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Cited in Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 570, 272 S.E.2d 417 (1980).

§ 48-13. Reference to parental status.

No reference shall be made in any petition, interlocutory decree, or final order of adoption to the marital status of the natural parents of the child sought to be adopted, to their fitness for the care and custody of such child, nor shall any reference be made therein to any child being born out of wedlock.

In the case of a child born out of wedlock and not legitimated prior to the time of the signing of the consent, an affidavit setting forth such facts sufficient to show that only the consent required under G.S. 48-6 is necessary shall be filed with the petition for adoption. (1949, c. 300; 1977, c. 879, s. 6.)

Effect of Amendments. — The 1977 amendment, effective Oct. 1, 1977, substituted "the petition for adoption" for "and become a part of the report provided for in G.S. 48-16" at the end of the second paragraph.

Session Laws 1977, c. 879, s. 9, provides in part that the act shall not affect pending litigation.

§ 48-17. Interlocutory decree of adoption.

CASE NOTES

Cited in In re Norwood, 43 N.C. App. 356, 258 S.E.2d 869 (1979).

§ 48-21. Final order of adoption; termination of proceeding within three years.

CASE NOTES

Cited in In re Norwood, 43 N.C. App. 356, 258 S.E.2d 869 (1979).

§ 48-22. Contents of final order.

CASE NOTES

Applied in Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

§ 48-23. Legal effect of final order.

Legal Periodicals. — For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For comment on "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

CASE NOTES

And Becomes a Stranger to the Bloodline, etc. —

By adoption, the adopted child becomes legally the child of the adoptive parents and becomes legally a stranger to the bloodline of his natural parents. Acker v. Barnes, 33 N.C. App. 750, 236 S.E.2d 715, cert. denied, 293 N.C. 360, 238 S.E.2d 149 (1977).

Prerogative to Determine with Whom Children Associate. — Dismissal for failure to state a claim upon which relief could be granted was proper where the paternal grandmother and natural aunt of children legally adopted by the present husband of the natural mother sought visitation rights, since parents with lawful custody of minor children retain the prerogative to determine with whom their children shall associate. Acker v. Barnes, 33 N.C. App. 750, 236 S.E.2d 715, cert. denied, 293 N.C. 360, 238 S.E.2d 149 (1977).

Right of Adopted Child to Inherit. — Taken in conjunction with each other, subdivisions (1) and (3) of this section give an adopted person the right to succeed to the estate of the adoptive parent upon intestacy, and to take under the will of the adoptive parent if the parent so provides. This result comes from a recognition of the absolute necessity, given the prevalence of adoptions in modern society, that adoption effect a complete substitution of families. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

Right of Adopted Child to Take under Will. — Subdivision (3), in providing that "descendant" includes any adopted person, "unless the contrary plainly appears by the terms thereof," provides a clear and certain rule of construction to be applied unless a contrary intent plainly appears from the terms of the instrument. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

Subdivision (3) applies to the orders of adoption from other states, as well as those under North Carolina law. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

Subdivision (3) does not abolish, etc. — It is well established that the cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the instrument itself, subject to the limits imposed by statute or decision. Subdivision (3) has not changed this principle, but merely has provided the courts with a clear and certain rule of construction to be applied unless a contrary intent plainly appears from the terms of the instrument. Stoney v. MacDougall, 31 N.C. App. 678, 230 S.E.2d 592 (1976), cert. denied, 291 N.C. 716, 232 S.E.2d 208 (1977).

Use of Word "Issue" in Will. — The mere use of the word "issue" in an instrument drafted prior to the enactment of subdivision (3) does not plainly reveal the contrary intent required by this section. Stoney v. MacDougall, 31 N.C. App. 678, 230 S.E.2d 592 (1976), cert. denied, 291 N.C. 716, 232 S.E.2d 208 (1977).

Applied in In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

§ 48-24. Recordation of adoption proceedings.

CASE NOTES

Cited in Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978).

§ 48-25. Record and information not to be made public; violation a misdemeanor.

(a) Neither the original file of the proceeding in the office of the clerk nor the recording of the proceeding by the Department of Human Resources shall be open for general public inspection.

(b) With the exception of the information contained in the final order, it shall be a misdemeanor for any person having charge of the file or the record to disclose, except as provided in subsection (d) of this section, G.S. 48-26, and as may be required under the provisions of G.S. 48-27, any information concerning the contents of any papers in the proceeding.

(c) No director of social services or any employee of a social services department nor a duly licensed child-placing agency or any of its employees, officers, directors or trustees shall be required to disclose any information, written or verbal, relating to any child or to its natural, legal or adoptive parents, acquired in the contemplation of an adoption of the child, except by order of the clerk of the superior court of original jurisdiction of the adoption, approved by order of a judge of that court, upon motion and after due notice of hearing thereupon given to the director of social services or child-placing agency; provided, however, that every director of social services and child-placing agency shall make to the court all reports required under the provisions of G.S. 48-16 and 48-19.

(d) Notwithstanding any other provision of law, certain nonidentifying information, if known, shall be given by the county department of social services or licensed child-placing agency which has such information in writing on a form provided by the Department of Human Resources to the adoptive parent or parents not later than the date of finalization of the adoption proceedings. The information described in this subsection, if known, shall, upon written request of the adoptee, be made available to the adoptee upon his reaching the age of 21. This information or any part thereof may be withheld only if it is of such a nature that it would tend to identify a biological relative of the adoptee. For any adoption completed prior to July 10, 1981, the information described in this subsection, if available, shall be given in writing to the adoptive parent or parents or legal guardian of any minor adoptee or to any adoptee who has reached the age of 21 years upon written request by such person to the agency which has the information. The nonidentifying information, if known, may include only the following:

(1) Date of the birth of the adoptee and his weight at birth;
(2) Age of biological parents in years, not dates of birth, at birth of the adoptee;
(3) Heritage of biological parents which shall consist of nationality, ethnic background, and race;
(4) Education, which shall be the number of years of school completed by the biological parents at the time of birth of the adoptee;
(5) General physical appearance of the biological parents at the time of birth of the adoptee in terms of height, weight, color of hair, eyes, skin.

(e) The county department of social services or licensed child-placing agency shall give if available a complete health history of biological parents and other relatives to the adoptive parent or parents not later than the date of finalization of the adoption proceedings and to the adoptee upon his written request. The information shall be given on a standardized form provided by the Department of Human Resources and shall include any information which would have a substantial bearing on the adoptee's mental or physical health. For any adoption completed prior to July 10, 1981, the information described in this subsection, if available, shall be given in writing to the adoptive parent or parents or legal guardian of any minor adoptee or to any adoptee upon written request by such person to the agency which has the information. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1979, c. 739, ss. 1, 2; 1981, c. 924, ss. 2, 3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, inserted the words "subsection (d) of this section," preceding "G.S. 48-26" in subsection (b), and added subsection (d).

The 1981 amendment rewrote subsection (d), which formerly provided only for the release of medical records or other information concerning the physical or mental health of the adopted child, with the excision of any information serving to identify the natural parents, and added subsection (e).

Legal Periodicals. — For comment on "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

CASE NOTES

Service of Motion and Notice of Hearing upon Director of Social Services Required. — Subsection (c) requires that before a director of social services shall be required to disclose any information acquired in contemplation of the adoption of a child, the director must be served with the motion and notice of hearing. In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

There is no requirement that the natural parents be served. In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

Failure to Grant Protective Order Held Not Error. — An appellate court could not hold that a district court in a child custody proceeding erred in failing to grant the defendant county department of social services a "protective order based upon confidentiality of records as set out in § 48-25" where the record on appeal did not reveal exactly what type of "protective order" was requested by the defendant and did not even clearly reveal that the district court, after being presented with a proper motion by the defendant for any such order, refused to grant it. Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Cited in Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978).

§ 48-26. Procedure for opening record for necessary information.

Legal Periodicals. — For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For comment on "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

CASE NOTES

Circumvention of Section under Guise of Waiver of Attorney-Client Privilege. — In a child custody action the trial court was correct in preventing circumvention of this section under the guise of a waiver of the attorney-client privilege, where the plaintiff subpoenaed the files of the plaintiff's former counsel who were employed to aid plaintiff and her deceased husband in adopting their first child, and the files most likely contained duplicates of many of the papers protected by §§ 48-24, 48-25 and this section. Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979).

Under this section, disclosure is permitted when the trial judge determines it to be in the best interest of the child or the public. In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

In making the determination that disclosure of any necessary information would be in the best interest of the child or the public, the judge should carefully weigh the interests of the child and the public, including the interests of the adoptive parents and the natural parents. Any conflict should be resolved in favor of the best interest of the child. In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

Finding of Fact Required. — There must be a finding of fact that the information sought to be revealed is necessary for the best interest of the child or the public before an order can be entered requiring disclosure of the information. In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

§ 48-29. Change of name; report to State Registrar; new birth certificate to be made.

Legal Periodicals. — For comment on "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

§ 48-36. Adoption of persons who are 18 or more years of age; change of name; clerk's certificate and record; notation on birth certificate; new birth certificate.

(a) Any person who is 18 or more years of age, or any two such persons who are lawfully married to each other, may petition the clerk of superior court that such person or persons be declared the adoptive parents of any other person who is 18 or more years of age who shall file with the clerk written consent to such adoption. The petitioners must have resided in North Carolina or on a federal territory therein for six months immediately preceding the filing of the petition. The petition and consent shall be filed with the clerk of superior court of the county in which the petitioners reside. The clerk shall not enter any order granting the petition until it has been made to appear to him that one copy each of the petition and the consent have been posted at the courthouse door continuously for 10 days immediately preceding such order. For good cause shown, the clerk may issue an order declaring the petitioners to be the adoptive parents of the person consenting to be adopted.

(b) Upon entry of the order of adoption in accordance with the provisions of subsection (a) of this section, the rights, duties, and obligations of the adoptive parents and the person adopted shall be, in relation to each other, and in relation to all other persons, the same as if the adoption had been completed under the provisions of this Chapter other than those contained in this section, and as if the adoption had taken place immediately before the person adopted became 18 years of age; provided, however, the provisions of this section shall not relieve any person of any duty to support any other person, nor shall the provisions of this section relieve any person of any criminal liability, arising under any other provision of law, for failure to provide support for any person.

(c) Except as provided in subsections (b), (d) and (e) of this section, the provisions of this Chapter which are not a part of this section shall not apply to the adoption of persons who are more than 18 years of age.

(d) Except in the case of a change of name in accordance with subsection (e) of this section, at the time of or subsequent to the entry of the order of adoption, the clerk may for proper cause shown and upon written application of the adoptive parents and the person adopted, issue an order changing the name of the person adopted from his true name to the name applied for. The order shall contain the true name, the county of birth, the date of birth, the full name of the person to be adopted, his county of birth, his date of birth, the full name of his parents as shown on his birth certificate, and the name sought to be adopted. The clerk shall issue to the person adopted a certificate under his hand and seal of office, stating the change made in the name, and shall record the applications and order on the docket of special proceedings in his court. He shall forward a copy of the change of name order to the State Registrar of Vital Statistics if the person adopted was born in North Carolina. Upon receipt of the order, the State Registrar shall note the change of name specified in the order on the birth certificate of the person adopted, and shall notify the register of deeds of the county of birth of the person adopted.

(e) If requested in the application for the change of name filed by the adoptive parents and the person adopted the clerk may, for good cause shown, before or after the entry of the order of adoption, decree a change of name in accordance with and subject to all the provisions of G.S. 48-29.

(f) Within 10 days after the order of adoption is entered, the clerk must file with the Department of Human Resources a copy of the petition giving the date of the filing of the original petition, the consent of the person sought to be adopted, and the order of adoption, and the Department of Human Resources must cause all papers pertaining to the proceeding to be permanently registered and filed. (1967, c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657.)

Cross References. — As to the effect of adoption upon registration to vote, see § 163-69.1.

Effect of Amendments. — The 1981 amendment deleted "and the person to be adopted" following "The petitioners" in the second sentence and substituted "shall be filed with the clerk of superior court of the county in which the petitioners reside" for "must be filed in the county where the person to be adopted resides" in the third sentence of subsection (a).

§ 48-37. Compensation for placing or arranging placement of child for adoption prohibited.

No person, agency, association, corporation, institution, society or other organization, except a licensed child-placing agency as defined by G.S. 48-2(4), or a county department of social services, shall offer or give, charge or accept any fee, compensation, consideration or thing of value for receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption. The act of preparing and filing the adoption proceeding before the court shall not be construed as receiving or placing, arranging the placement of, or assisting in placing or arranging the placement of, any child for adoption. Any person who violates any provision of this section shall be guilty of a misdemeanor, and upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court. Any person who is convicted of or pleads guilty to a second or subsequent violation of this section shall be guilty of a felony and shall be imprisoned for not more than three years or fined not more than ten thousand dollars ($10,000) or both at the discretion of the court. (1975, c. 335, s. 1.)

Editor's Note. — This section is set out to substitute "G.S. 48-2(4)" for "G.S. 48-2(2)" in the first sentence, pursuant to Session Laws 1981, c. 924, which rearranged the definitions in § 48-2.

OPINIONS OF ATTORNEY GENERAL

Arrangement by Prospective Adoptive Parents to Pay Transportation Expenses and Medical Costs for Expectant Mother. — Prospective adoptive parents who enter into an arrangement with an expectant mother to pay her transportation expenses to North Carolina as well as all medical costs incident to the birth of the child pursuant to an independent adoption placement violate the provisions of this section. Opinion of Attorney General to Renee P. Hill, 45 N.C.A.G. 24 (1975).

§ 48-38. Advertisements soliciting children for adoption prohibited.

No person, agency, association, corporation, society or other organization, except a licensed child-placing agency as defined in G.S. 48-2, a county department of social services, or the Department of Human Resources, shall publish, transmit, broadcast, or otherwise distribute any advertisement of any type whatsoever which solicits the receiving or placing of children for adoption, or which solicits the custody of children. Any person who violates any provision of this section shall be guilty of a misdemeanor and upon conviction or plea of guilty shall be fined or imprisoned or both at the discretion of the court. (1975, c. 335, s. 2; 1981, c. 275, s. 6.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, deleted "institution," following "corporation," near the beginning of the first sentence, substituted "G.S. 48-2" for "G.S. 48-2(2)" in that sentence and deleted "or" preceding "a county department of social services" and inserted "or the Department of Human Resources" in that sentence.

Session Laws 1981, c. 275, s. 9, contains a severability clause.

§§ 48-39 to 48-39.2: Repealed by Session Laws 1981, c. 275, s. 4, effective October 1, 1981.

Cross References. — For present provisions as to State benefits for certain hard-to-place adoptive children, see § 108A-50.

Chapter 48A.

Minors.

§ 48A-1. Common-law definition of "minor" abrogated.

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

§ 48A-2. Age of minors.

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

CASE NOTES

Legal Obligation of Support. —

Nothing else showing, where an order of the court for support entered prior to the effective date of this section provides for support of the children until the age of majority, maturity or emancipation, it has been interpreted, in light of this section, to impose the legal obligation of support only to the child's eighteenth birthday. Harding v. Harding, 29 N.C. App. 633, 225 S.E.2d 590, cert. denied, 290 N.C. 661, 228 S.E.2d 452 (1976).

Applied in Loer v. Loer, 31 N.C. App. 150, 228 S.E.2d 473 (1976).

Cited in Shaffner v. Shaffner, 36 N.C. App. 586, 244 S.E.2d 444 (1978).

§ 48A-3. Statute of limitations; applicability.

Legal Periodicals. — For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

Chapter 49.

Bastardy.

Article 1.

Support of Illegitimate Children.

Sec.
49-2. Nonsupport of illegitimate child by parents made misdemeanor.
49-5. Prosecution; death of mother no bar; determination of fatherhood.
49-7. Issues and orders.

Article 2.

Legitimation of Illegitimate Children.

49-10. Legitimation.

Article 3.

Civil Actions Regarding Illegitimate Children.

Sec.
49-14. Civil action to establish paternity.
49-17. Jurisdiction over nonresident or nonpresent persons.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

Any parent who willfully neglects or who refuses to provide adequate support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this Article shall be any person less than 18 years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2; 1951, c. 154, s. 1; 1977, c. 3, s. 1.)

Effect of Amendments. — The 1977 amendment inserted "provide adequate" near the beginning of the first sentence.

CASE NOTES

Purpose. —

The purpose of this section is not to confer rights upon either the mother or the father but to protect the child and to protect the State against the child's becoming a public charge. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Elements of Offense. —

In accord with 2nd paragraph in 1977 Cum. Supp. See State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

Violation of Statute Is Continuing Offense. —

The criminal offense of willful nonsupport of an illegitimate child by a parent of the child may be repeated and, if it is, prosecution for the subsequent offense is not barred by the prosecution for the former offense on the theory of double jeopardy. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

In accord with 2nd paragraph in original. See State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977).

The begetting of, etc. —

The criminal offense is not committed by the begetting but by the willful nonsupport of the child. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

The question of paternity, etc. —

In accord with 2nd paragraph of original. See Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

The State's right to proceed under this section does not, as a matter of law, require the consent of the mother or of the child to the bringing of the proceeding, however important to its case may be the mother's cooperation as a witness. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

But Paternity Need Not Be Relitigated, etc. —

Upon a subsequent prosecution of an alleged father, the question of paternity, necessarily determined against him in the previous criminal action, need not be relitigated, that question being res judicata. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

In accord with 1st paragraph in original. See State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977), cert. denied, 294 N.C. 184, 241 S.E.2d 519 (1978).

A general verdict of "guilty" or "guilty as charged" to a valid charge of violation of this section is adequate as a finding of paternity. State v. Golden, 40 N.C. App. 37, 251 S.E.2d 875 (1979).

Effect of Proceedings under Section upon Subsequent Civil Proceedings to Establish Paternity. — Since the parties to a previous criminal proceeding under this section and civil proceedings under § 49-14 are not the same, and the State and the present plaintiff were not in privity, the defendant was not estopped in a civil action to deny paternity. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Appointment of Counsel. —

In accord with 1st paragraph of original. See Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

In a prosecution for willful failure to support an illegitimate child, the defendant had a constitutional right to be represented by counsel at his trial unless he knowingly and intelligently waived that right, since violation of this section can result in imprisonment. State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

Sufficiency of Summons Issued under Section. — See State v. Walton, 41 N.C. App. 281, 254 S.E.2d 661 (1979).

Cited in Smith v. Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976); Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980).

§ 49-5. Prosecution; death of mother no bar; determination of fatherhood.

Proceedings under this Article may be brought by the mother or her personal representative or, if the child is likely to become a public charge, the director of social services or such person as by law performs the duties of such official in said county where the mother resides or the child is found. Proceedings under this Article may be brought in the county where the mother resides or is found, or in the county where putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the State of North Carolina shall not be a bar to proceedings against the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. The death of the mother shall in no wise affect any proceedings under this Article. Preliminary proceedings under this Article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next session of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4; 1961, c. 186; 1969, c. 982; 1971, c. 1185, s. 18; 1981, c. 599, s. 13.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "Proceedings under this Article may be brought" for "Indictments under this Article may be returned" at the beginning of the second sentence, and substituted "proceedings against" for "indictment of" near the middle of the third sentence.

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

CASE NOTES

Joining of Mother In Prosecution Not Required. — Prosecution of the alleged father for the violation of § 49-2 may be initiated by the mother, but her joining therein is not a prerequisite to the validity of the prosecution. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Continuance until after Birth of Child. — It would seem that in a preliminary proceeding under this section a continuance until the birth of the child would be required when a defendant requests a blood-grouping test under § 49-7. State v. Morgan, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

§ 49-7. Issues and orders.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings. The court in fixing this sum shall take into account the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child. The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought, on motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist or other duly qualified person. The evidentiary effect of those blood tests and comparisons and the manner in which the expenses therefor are to be taxed as costs shall be as prescribed in G.S. 8-50.1. In addition, if a jury tries the issue of parentage, they shall be instructed as set out in G.S. 8-50.1. From a finding on the issue of parentage against the alleged-parent defendant, the alleged-parent defendant has the same right of appeal as though he or she had been found guilty of the crime of willful failure to support an illegitimate child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1945, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2; 1979, c. 576, s. 2.)

Effect of Amendments. — The 1977 amendment inserted "provide adequate" near the end of the second sentence of the first paragraph.

The 1979 amendment rewrote the second paragraph.

CASE NOTES

A defendant's right to a blood test, etc. — In accord with original. See State v. Morgan, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

The 1975 amendment to § 8-50.1 amplifies the importance of the right to a blood-grouping test under this section. State v. Morgan, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

Issue of Paternity, etc. — An affirmative answer to the question of paternity is an indispensable prerequisite to the defendant's conviction on the criminal charge. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Applied in State v. White, 42 N.C. App. 320, 256 S.E.2d 505 (1979).

Quoted in State v. Walton, 41 N.C. 281, 254 S.E.2d 661 (1979).

Cited in State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977); State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 49-8. Power of court to modify orders; suspend sentence, etc.

CASE NOTES

Cited in State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979); Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980).

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. A certified copy of a certificate of birth of the child shall be attached to the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiff's side of the cross-index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross-index. (Code, s. 39; Rev., s. 263; C.S., s. 277; 1947, c. 663, s. 1; 1971, c. 154; 1977, c. 83, s. 1.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, added the present third sentence.

CASE NOTES

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and, (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

No Violation of Equal Protection Clause. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

§ 49-11. Effects of legitimation.

CASE NOTES

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and, (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

No Violation of Equal Protection Clause. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

§ 49-12. Legitimation by subsequent marriage.

Legal Periodicals. — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and, (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

No Violation of Equal Protection Clause. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

Section 49-13 in Pari Materia. — This section and § 49-13 regulate the family circle and define the rights and responsibilities of members of the circle, and must be construed in pari materia. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

"Reputed Father". —

In accord with 2nd paragraph in original. See Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

Applied in Myers v. Myers, 39 N.C. App. 201, 249 S.E.2d 853 (1978).

§ 49-13. New birth certificate on legitimation.

CASE NOTES

Section 49-12 in Pari Materia. — Section 49-12 and this section regulate the family circle and define the rights and responsibilities of members of the circle, and must be construed in pari materia. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

Estoppel from Collateral Attack on Admission of Paternity. — Despite the fact that defendant-husband apparently made a false affidavit of paternity in obtaining a new birth certificate for the child under this section, he was estopped from collaterally attacking his admission of paternity in a later proceeding for support. Chambers v. Chambers, 43 N.C. App. 361, 258 S.E.2d 822 (1979).

Applied in Myers v. Myers, 39 N.C. App. 201, 249 S.E.2d 853 (1978).

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

(a) The paternity of a child born out of wedlock may be established by civil action. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

(b) Proof of paternity pursuant to this section shall be beyond a reasonable doubt.

(c) No such action shall be commenced nor judgment entered after the death of the putative father. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, added the second sentence of subsection (a).

The 1981 amendment, effective Oct. 1, 1981, rewrote subsection (c).

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on constitutional law and illegitimate's paternal inheritance rights, see 16 Wake Forest L. Rev. 205 (1980).

For note on a default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

CASE NOTES

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and, (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The purposes of this article are manifestly to enable an illegitimate child to receive support from its biological father and prevent it from becoming a public charge. County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980).

No Violation of Equal Protection Clause. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The statutory scheme established by § 29-19 and the other statutes referred to therein

(§§ 49-14 through 49-16) does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Former Statute of Limitations under This Section Unconstitutional. — See County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980).

Suit to Establish Paternity Not Criminal in Nature. — A suit brought for the sole purpose of establishing paternity pursuant to this section, is not a criminal prosecution and cannot be considered criminal in nature simply because plaintiff must meet a higher burden of proof, and establish such paternity beyond a reasonable doubt. Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980).

Effect of Criminal Proceedings under § 49-2 upon Proceedings under This Section. — Since the parties to a previous criminal proceeding under § 49-2 and civil proceedings under this section are not the same, and the State and the present plaintiff were not in privity, the defendant was not estopped in the civil action to deny paternity. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

§ 49-15. Custody and support of illegitimate children when paternity established.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and, (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

No Violation of Equal Protection Clause. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The statutory scheme established by § 29-19 and the other statutes referred to therein (§§ 49-14 through 49-16), does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

This section contemplates that parents' rights may be determined and enforced in an action brought pursuant to § 49-14. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

And does not contemplate the bringing of a separate action for that purpose pursuant to § 50-13.1 et seq., which relates to the custody and support of legitimate children. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

An action to enforce liability under this section is barred after three years under § 1-52(2). Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Statute of Limitation Applies to Each Expenditure. — Each time a mother makes an expenditure reasonably incurred for the support of a child, such expenditure creates in her a new right to reimbursement so that the statute of limitation applicable to proceedings hereunder, § 1-52(2), begins to run against each expenditure on the date when the expenditure was made. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Cited in Joyner v. Lucas, 42 N.C. App. 541, 257 S.E.2d 105 (1979).

§ 49-16. Parties to proceeding.

CASE NOTES

Purpose of Procedure for Legitimation. — By specifying the manner and time in which an illegitimate may establish his paternity, this State has sought (1) to mitigate the hardships created by former law (which permitted illegitimates to inherit only from the mother and from each other); (2) to equalize insofar as practical the inheritance rights of legitimate and illegitimate children; and, (3) at the same time to safeguard the just and orderly disposition of a decedent's property and the dependability of titles passing under intestate laws. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

No Violation of Equal Protection Clause. — Sections 29-19, 49-10 through 49-12 and 49-14 through 49-16, construed together, do not violate the equal protection clause of the United States Constitution. Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979).

The statutory scheme established by § 29-19 and the other statutes referred to therein (§§ 49-14 through 49-16), does not discriminate against illegitimate children in such manner as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Outlaw v. Planters Nat'l Bank & Trust Co., 41 N.C. App. 571, 255 S.E.2d 189 (1979).

Cited in Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976); Joyner v. Lucas, 42 N.C. App. 541, 257 S.E.2d 105 (1979).

§ 49-17. Jurisdiction over nonresident or nonpresent persons.

(a) The act of sexual intercourse within this State constitutes sufficient minimum contact with this forum for purposes of subjecting the person or persons participating therein to the jurisdiction of the courts of this State for actions brought under this Article for paternity and support of any child who may have been conceived as a result of such act.

(b) The jurisdictional basis in subsection (a) of this section shall be construed in addition to, and not in lieu of, any basis or bases for jurisdiction within G.S. 1-75.4. (1979, c. 542.)

Chapter 50.

Divorce and Alimony.

Sec.
50-3. Venue; removal of action.
50-4. What marriages may be declared void on application of either party.
50-5. Grounds for absolute divorce.
50-6. Divorce after separation of one year on application of either party.
50-7. Grounds for divorce from bed and board.
50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.
50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; parties cannot testify to adultery; procedure same as ordinary civil actions.
50-11. Effects of absolute divorce.
50-11.2. Judgment provisions pertaining to care, custody, tuition and maintenance of minor children.
50-11.3. Certain judgments entered prior to January 1, 1981, validated.
50-12. Resumption of maiden name or adoption of name of prior deceased husband.

Sec.
50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.
50-13.3. Enforcement of order for custody.
50-13.4. Action for support of minor child.
50-13.5. Procedure in actions for custody or support of minor children.
50-13.7. Modification of order for child support or custody.
50-13.8. Support of persons incapable of self-support upon reaching majority.
50-16.1. Definitions.
50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.
50-16.8. Procedure in actions for alimony and alimony pendente lite.
50-19. Maintenance of certain actions as independent actions permissible.
50-20. Distribution by court of marital property upon divorce.
50-21. Procedures in actions for equitable distribution of property.

§ 50-3. Venue; removal of action.

In all proceedings for divorce, the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides.

[In] any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, shall order the removal of the action, and the procedures of G.S. 1-87 shall be followed. (1871-2, c. 193, s. 40; Code, s. 1289; Rev., s. 1559; 1915, c. 229, s. 1; C. S., s. 1657; 1977, 2nd Sess., c. 1223.)

Effect of Amendments. — The 1977, 2nd Sess., amendment added the second paragraph.

CASE NOTES

Right to Venue Is Substantial. — Although the question of venue is a procedural one, a right to venue established by statute is a substantial right. Its status is secure when finally adjudicated by a court of competent jurisdiction, and neither the courts nor the legislature can thereafter invalidate the right's exercise or annul the judgment which fixes its investiture. Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980).

Amendment Pertaining to Removal Mandatory. — The language of this section as amended is mandatory. If the defendant makes the motion for change of venue, the judge shall grant it. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979), aff'd, 300 N.C. 715, 268 S.E.2d 468 (1980).

And Applies Retroactively. — The retroactive application of this section to causes of action which accrued prior to the effective date of the statute is proper. No vested right is destroyed, nor does a question of construction arise where a venue statute, by its own provisions, is declared to apply to transactions entered into prior to the passage of the statute. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979), aff'd, 300 N.C. 715, 268 S.E.2d 468 (1980).

But Not to Action Settling Venue before Effective Date. — The amendment of this section providing for removal of an action for divorce or alimony, upon motion of defendant, to the county in which defendant resides where plaintiff has ceased to be a resident of this State is mandatory and may be applied retroactively and even to actions pending on its effective date. However, it would not be applicable to an action for divorce from bed and board where it became effective after the trial court made a decision settling the question of venue. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979), aff'd, 300 N.C. 715, 268 S.E.2d 468 (1980).

Limitation on Retroactive Application of Section. — This statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis. Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980).

Applied in Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

Cited in Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978); Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

§ 50-4. What marriages may be declared void on application of either party.

The district court, during a session of court, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in the Chapter entitled Marriage, or declared void by said Chapter, may declare such marriage void from the beginning, subject, nevertheless, to G.S. 51-3. (1871-2, c. 193, s. 33; Code, s. 1283; Rev., s. 1560; C. S., s. 1658; 1945, c. 635; 1971, c. 1185, s. 21; 1973, c. 1; 1979, c. 525, s. 10.)

Effect of Amendments. — The 1979 amendment deleted "the second proviso contained in" preceding "G.S. 51-3" at the end of the section.

Session Laws 1979, c. 525, s. 12, provides that the amendment shall not affect pending litigation.

CASE NOTES

Former Divorce Decree Held Voidable, Not Void. — Where a divorce decree obtained by defendant wife from her former husband on the ground of separation for one year was in all respects regular on the face of the record, the divorce decree was not void but merely voidable even though there was proof that defendant and her former husband had not lived separate and apart for one year as of the time of the divorce; therefore, plaintiff husband had no standing collaterally to attack the divorce decree as to show that his subsequent marriage to defendant was void ab initio. Maxwell v. Woods, 47 N.C. App. 495, 267 S.E.2d 516 (1980).

Cited in Armstrong v. Armstrong, 41 N.C. App. 168, 254 S.E.2d 209 (1979).

§ 50-5. Grounds for absolute divorce.

Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

Legal Periodicals. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

CASE NOTES

Proper Parties to Divorce. — The only persons who may bring an action for absolute divorce are those persons who are lawfully married to one another. Where there are children born to a marriage it is neither proper nor necessary for them to be made parties to an action for divorce between their parents. There are but two necessary parties to an action for divorce: husband and wife. Likewise, the only necessary parties in an action to set aside an absolute divorce decree after the husband's death are the surviving spouse and the personal representative of the deceased spouse. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Joinder of Grounds in Complaint. — Where the grounds are listed in the statutes for the same kind of divorce, the several grounds may be joined in one complaint, and the decree may be granted on any one of the grounds proved. Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980).

(1)

CASE NOTES

Adultery is adequate cause for separation. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

Condonation. — Condonation is the forgiveness of a marital offense constituting a ground for divorce. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

Condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offense afterwards, and moreover treat the forgiving party, in all respects, with conjugal kindness; and, if the condition shall be violated, then the original offense shall be revived. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

Voluntary sexual intercourse by the innocent spouse, with knowledge or reason to know that the other has committed adultery, usually operates as a condonation of the offense. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

(4)

CASE NOTES

Separation, as this word is used, etc. — In accord with 1st paragraph in original. See In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

In accord with 2nd paragraph in original. See In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Effect of Resumption of Cohabitation upon Separation Agreement. — The same public policy which will not permit spouses to continue to live together in the same home — holding themselves out to the public as husband and wife — to sue each other for an absolute divorce on the ground of separation, or to base the period of separation required for a divorce on any time they live together, will also nullify a separation agreement if the parties resume marital cohabitation. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

When separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife in the ordinary acceptation of the descriptive phrase. Irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinded their separation agreement insofar as it had not been executed. Further, a subsequent separation will not revive the agreement. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

(6) In all cases where a husband and wife have lived separate and apart for three consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the peti-

tion of the sane spouse: Provided, if the insane spouse has been released on a trial basis to the custody of his or her respective spouse such shall not be considered as terminating the status of living "separate and apart" nor shall it be considered as constituting "cohabitation" for the purpose of this section nor shall it prevent the granting of a divorce as provided by this section. Provided further, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined or examined for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered or, if not so confined, has been examined at least three years preceding the institution of the action for divorce and then found to be incurably insane as hereinafter provided. Provided further, that proof of incurable insanity be supported by the testimony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution where the insane spouse is confined, and one regularly practicing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined; and provided further that a sworn statement signed by said staff member or said superintendent of the institution wherein the insane spouse is confined or was examined shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse and as to whether or not said insane spouse is suffering from incurable insanity, or the parties according to the laws governing depositions may take the deposition of said staff member or superintendent of the institution wherein the insane spouse is confined; and provided further that incurable insanity may be proved by the testimony of one or more licensed physicians who are members of the staff of one of this State's accredited four-year medical schools or a state-supported mental institution, supported by the testimony of one or more other physicians licensed by the State of North Carolina, that each of them examined the allegedly incurable insane spouse at least three years preceding the institution of the action for divorce and then determined that said spouse was suffering from incurable insanity and that one or more of them examined the allegedly insane spouse subsequent to the institution of the action and that in his or their opinion the said allegedly insane spouse was continuously incurably insane throughout the full period of three years prior to the institution of the said action.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered prescribed in the preceding paragraph, it shall be sufficient if the evidence shall show that the allegedly insane spouse was adjudicated to be insane more than three years preceding the institution of the action for divorce, that such insanity has continued without interruption since such adjudication and that such person has not been adjudicated to be sane since such adjudication of insanity; provided, further, proof of incurable insanity existing after the institution of the action for divorce shall be furnished by the testimony of two reputable, regularly practicing physicians, one of whom shall be a psychiatrist.

In lieu of proof of incurable insanity and confinement for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered, or the adjudication of insanity, as prescribed in the preceding paragraphs, it shall be sufficient if the evidence shall show that the insane spouse was examined by two or more members of the staff of one of this

State's accredited four-year medical schools, both of whom are medical doctors, at least three years preceding the institution of the action for divorce with a determination at that time by said staff members that said spouse is suffering from incurable insanity, that such insanity has continued without interruption since such determination; provided, further, that sworn statements signed by the staff members of the accredited medical school who examined the insane spouse at least three years preceding the commencement of the action shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse as to whether or not said insane spouse was suffering from incurable insanity; provided, further, that proof of incurable insanity under this section existing after the institution of the action for divorce shall be furnished by the testimony of two reputable physicians, one of whom shall be a psychiatrist on the staff of one of the State's accredited four-year medical schools, and one a physician practicing regularly in the community wherein such insane person resides.

In all decrees granted under this subdivision in actions in which the insane defendant has insufficient income and property to provide for his or her own care and maintenance, the court shall require the plaintiff to provide for the care and maintenance of the insane defendant for the defendant's lifetime, based upon the standards set out in G.S. 50-16.5(a). The trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring plaintiff to furnish the necessary funds for such care and maintenance.

Service of process shall be held upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed guardian ad litem and also upon the superintendent or physician in charge of the institution wherein the insane spouse is confined. Such guardian or guardian ad litem shall make an investigation of the circumstances and notify the next of kin of the insane spouse or the superintendent of the institution of the action and whenever practical confer with said next of kin before filing appropriate pleadings in behalf of the defendant.

In all actions brought under this subdivision, if the jury finds as a fact that the plaintiff has been guilty of such conduct as has conduced to the unsoundness of mind of the insane defendant, the relief prayed for shall be denied.

The plaintiff or defendant must have resided in this State for six months next preceding institution of any action under this section. (1977, c. 501, s. 1.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, rewrote subdivision (6).

Session Laws 1977, c. 501, s. 3, provides that the act shall not affect pending litigation.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (6) are set out.

Legal Periodicals. — For article entitled, "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

CASE NOTES

Cited in Ponder v. Ponder, 32 N.C. App. 150, 230 S.E.2d 786 (1977).

§ 50-6. Divorce after separation of one year on application of either party.

Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. A divorce under this section shall not be barred to either party by any defense or plea based upon any provision of G.S. 50-5 or G.S. 50-7, a plea of res judicata, or a plea of recrimination. Notwithstanding the provisions of G.S. 50-11, or of the common law, a divorce under this section shall not affect the rights of a dependent spouse with respect to alimony which have been asserted in the action or any other pending action. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3; 1949, c. 264, s. 3; 1965, c. 636, s. 2; 1977, c. 817, s. 1; 1977, 2nd Sess., c. 1190, s. 1; 1979, c. 709, s. 1; 1981, c. 182.)

Effect of Amendments. — The 1977 amendment, effective Aug. 1, 1977, added the third sentence.

The 1977, 2nd Sess., amendment, rewrote the former third sentence as the present third and fourth sentences.

The 1979 amendment, effective July 1, 1979, rewrote the present third sentence, which formerly read: "A plea of res judicata or of recrimination, with respect to any provision of G.S. 50-5 or of 50-7, shall not be a bar to either party's obtaining a divorce under this section."

Session Laws 1977, c. 817, s. 2, provides that the act shall not affect pending litigation.

Session Laws 1977, 2nd Sess., c. 1190, s. 2, provides: "In an action initiated after August 1, 1977, a judgment of divorce under G.S. 50-6, entered before the effective date of this act [June 11, 1978] and when there was no pending action for support or alimony, shall be valid even though the court did not make a determination that there was no such pending action or a determination that all claims for support or alimony had been fully and finally adjudicated."

The 1981 amendment, effective Oct. 1, 1981, deleted "obtained by a supporting spouse" following "a divorce under this section" in the last sentence.

Legal Periodicals. — For article entitled "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For a note discussing the application of the compulsory counterclaim provision of § 1A-1, Rule 13 in divorce suits, see 57 N.C.L. Rev. 439 (1979).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

For note on the effect of resumed marital relations on separation agreements, see 1 Campbell L. Rev. 131 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on voiding separation agreements by isolated acts of sexual intercourse, see 16 Wake Forest L. Rev. 137 (1980).

CASE NOTES

Constitutionality. — There is no merit in defendant's contention that this section as amended is unconstitutional because it violates the equal protection clauses contained in the Fourteenth Amendment to the federal Constitution and in Art. 1, § 19, of the State Constitution. The argument that the amended section violates equal protection by preserving a dependent spouse's right to alimony without at the same time preserving all other property rights incident to continuation of the marital status is beside the mark. The equal protection clauses of the State and federal Constitutions prohibit the denial of the equal protection of the laws to persons, not to rights. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

No Fault. — As to divorces grounded on a one-year separation of the parties, this State is a "no-fault" jurisdiction; i.e., a showing that the parties have achieved the required periods of residency and separation is all that is necessary to obtain a divorce in this State under this section. Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

Proper Parties. — The only persons who may bring an action for absolute divorce are those persons who are lawfully married to one another. Where there are children born to a marriage it is neither proper nor necessary for them to be made parties to an action for divorce between their parents. There are but two necessary parties to an action for divorce: husband and wife. Likewise, the only necessary parties in an action to set aside an absolute divorce decree after the husband's death are the surviving spouse and the personal representative of the deceased spouse. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Applicability of § 50-10. — The application to divorces under this section of the § 50-10 requirement that the factual allegations supporting the divorce must be deemed denied requires a finding of the necessary facts. While it remains sound public policy not to allow the granting of such divorces on the pleadings, it would, nevertheless, appear that it would make good jurisprudential sense to clearly remove divorces under this section from the more cumbersome jury procedure and provide that all such cases be heard by the judge without a jury. Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

"Judicial Separation" Included. —

The pendente lite order in the wife's action for divorce from bed and board legalized the separation between the husband and wife since it provided not only for alimony pendente lite and child custody but also that the wife have the sole use and peaceful and undisturbed possession of the residence, and such separation having continued for the requisite one year thereafter, the plaintiff-husband became entitled to a divorce. Earles v. Earles, 29 N.C. App. 348, 224 S.E.2d 284 (1976).

Separation means cessation, etc. —

In accord with original. See In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

In accord with original. See Tuttle v. Tuttle, 36 N.C. App. 635, 244 S.E.2d 447 (1978).

Physical Separation Must Be Accompanied, etc. —

The words "separate and apart," as used in this section, mean that there must be both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation. Earles v. Earles, 29 N.C. App. 348, 224 S.E.2d 284 (1976).

Plaintiff Need Not Establish, etc. —

In an action for absolute divorce under this section, the plaintiff need not allege and prove that he or she is an injured party. Earles v. Earles, 29 N.C. App. 348, 224 S.E.2d 284 (1976).

When Requirements for Valid Separation Not Satisfied. — The law delineates two circumstances under which the law will hold spouses to have failed to satisfy the requirements of a valid separation: first, sexual activity between the parties, and, second, such association between the parties as to induce others to regard them as living together. Ledford v. Ledford, 49 N.C. App. 226, 271 S.E.2d 393 (1980).

Casual and isolated social acts between separated spouses do not as a matter of law create a holding out as man and wife. Ledford v. Ledford, 49 N.C. App. 226, 271 S.E.2d 393 (1980).

Effect of Resumption of Cohabitation upon Separation Agreement. — When separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife in the ordinary acceptation of the descriptive phrase. Irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinded their separation agreement insofar as it had not been executed. Further, a subsequent separation will not revive the agreement. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

The same public policy which will not permit spouses to continue to live together in the same home — holding themselves out to the public as husband and wife — to sue each other for an absolute divorce on the ground of separation, or to base the period of separation required for a divorce on any time they live together, will also nullify a separation agreement if the parties resume marital cohabitation. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

The heart of a separation agreement is the parties' intention and agreement to live separate and apart forever, and when a husband and wife enter into a deed of separation the policy of the law is that they are to live separate. Therefore, they void the separation agreement if they reestablish a matrimonial home. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Sexual intercourse between a husband and wife after the execution of separation agreement avoids the contract. Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1978).

Recrimination does not constitute a bar to plaintiff's action for divorce based on one year's separation. Smith v. Smith, 42 N.C. App. 246, 256 S.E.2d 282 (1979).

Even if Acts Occurred Prior to Effective Date of Amendment. — Recrimination cannot be asserted as a defense in actions for absolute divorce based on a year's separation brought after July 31, 1977. Therefore, since plaintiff's action was begun on August 30, 1978, the defense of recrimination in the form of abandonment would not be available to defendant even though the alleged abandonment occurred prior to the effective date of the statute. Boone v. Boone, 44 N.C. App. 79, 259 S.E.2d 921 (1979).

Or if Acts Occurred after Separation. — The defense of recrimination cannot be asserted in actions for absolute divorce instituted in this State after 31 July, 1977, even if the alleged adulterous acts on the part of the plaintiff occurred after the separation of the parties. Edwards v. Edwards, 43 N.C. App. 296, 259 S.E.2d 11 (1979).

The elimination of the recriminatory defenses based upon § 50-7 by the second 1977 amendment does not apply retroactively. Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

Effect of Decree Denying Alimony. — If a separation is legalized by an award of alimony without divorce, there is no sound reason why it should not also be legalized by a decree denying alimony based upon a finding of no dependency. In each case the court has considered and determined the respective rights and obligations of the separated parties insofar as support is concerned. In neither case is the court able to mend the broken marriage or to force the parties to live together if either persists in continuing to live apart. Cook v. Cook, 41 N.C. App. 156, 254 S.E.2d 261 (1979).

The separation of the parties became legalized by the entry of the judgment which denied defendant alimony and by entry of the order which awarded her possession of the house. The parties having lived separate and apart for more than one year after their separation thus became legalized, plaintiff was entitled to maintain an action for an absolute divorce under this section. The adjudication made in the prior action that plaintiff had originally wrongfully abandoned the defendant was not effective as a bar in later action. Cook v. Cook, 41 N.C. App. 156, 254 S.E.2d 261 (1979).

A stay of plaintiff's action for absolute divorce was not required pending resolution of defendant's counterclaim for alimony in plaintiff's earlier action for divorce from bed and board, since defendant's claim for alimony, having been asserted in the prior action, will not be affected by an absolute divorce obtained by plaintiff in the action for absolute divorce. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Joinder of Grounds in Complaint. — Where the grounds are listed in the statutes for the same kind of divorce, the several grounds may be joined in one complaint, and the decree may be granted on any one of the grounds proved. Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980).

Applied in Ponder v. Ponder, 32 N.C. App. 150, 230 S.E.2d 786 (1977); Gerringer v. Gerringer, 42 N.C. App. 580, 257 S.E.2d 98 (1979); In re Hayes, 43 N.C. App. 515, 259 S.E.2d 327 (1979); Wilhelm v. Wilhelm, 43 N.C. 549, 259 S.E.2d 319 (1979).

Quoted in O'Hara v. O'Hara, 46 N.C. App. 819, 266 S.E.2d 59 (1980).

Stated in Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979).

Cited in Wise v. Wise, 42 N.C. App. 5, 255 S.E.2d 570 (1979).

§ 50-7. Grounds for divorce from bed and board.

The court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

Legal Periodicals. — For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For a note discussing the application of the compulsory counterclaim provision of § 1A-1, Rule 13 in divorce suits, see 57 N.C.L. Rev. 459 (1979).

CASE NOTES

No Action for "No Fault" Divorce from Bed and Board. — Where a husband and wife are living together and the children are in their joint custody and are being adequately supported by the supporting spouse, in the absence of allegations which would support an award of alimony or divorce, one spouse may not maintain an action to evict the other, get sole custody of the children, and obtain an order for child support; therefore, the trial court erred in denying defendant's motion to dismiss on the ground the complaint failed to state a claim upon which relief could be granted, since the complaint attempted to assert, and the court allowed, what appeared to be a "no fault" divorce from bed and board, and such an action does not lie in this State. Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981).

A divorce from bed and board is nothing more, etc. —

In accord with original. See Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978).

No Requirement for Separation of Parties. — There is no requirement for a separation of the parties in the sense of one moving out of the home before an action can be instituted and prosecuted under this section for divorce from bed and board. Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978).

A wife may pursue an action for divorce from bed and board and alimony while the husband is staying in the same house with her. Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978).

Findings of Fact. — In an action for divorce from bed and board under this section, the trial court should make adequate findings of facts (i.e. specific acts of misconduct) to support the conclusion of law that the noninjured party has (1) abandoned the family; (2) maliciously turned the other out of doors; (3) endangered the life of the other by cruel or barbarous treatment; (4) offered such indignities to the person of the other as to render his or her condition intolerable; or (5) become an excessive user of alcohol or drugs so that the other's life is burdensome. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

Cited in Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Cook v. Cook, 41 N.C. App. 156, 254 S.E.2d 261 (1979).

(1)

Legal Periodicals. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on separability of support and property provisions in ambiguous separation agreements, see 16 Wake Forest L. Rev. 152 (1980).

CASE NOTES

Acts Which Constitute Abandonment. — One spouse abandons the other where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. Morris v. Morris, 46 N.C. App. 701, 266 S.E.2d 381, aff'd, 301 N.C. 525, 272 S.E.2d 1 (1980).

The burden of proof upon a plaintiff alleging defendant's abandonment is not to negate every possible justification for defendant-husband's leaving, but rather to prove only the absence of conduct on her part which rendered it impossible for him to continue in the marriage. Morris v. Morris, 46 N.C. App. 701, 266 S.E.2d 381, aff'd, 301 N.C. 525, 272 S.E.2d 1 (1980).

Where a spouse seeks to recover alimony on the grounds of abandonment, that spouse has the burden of proving each and every element of abandonment, including the absence of justification. Morris v. Morris, 46 N.C. App. 701, 266 S.E.2d 381, aff'd, 301 N.C. 525, 272 S.E.2d 1 (1980).

Applied in Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980).

(3) By cruel or barbarous treatment endangers the life of the other. In addition, the court may grant the victim of such treatment the remedies available under G.S. 50B-1, et seq.

(1979, c. 561, s. 5.)

Editor's Note. — The reference to G.S. 50B-1 et seq. in subdivision (3) of this section was erroneously printed G.S. 50A-1 et seq. in the 1979 Cumulative Supplement. The reference is to the chapter enacted as G.S. Chapter 50A by Session Laws 1979, c. 561, but codified as Chapter 50B in this Supplement.

Effect of Amendments. — The 1979 amendment, effective October 1, 1979, added the second sentence of subdivision (3).

Session Laws 1979, c. 561, s. 8, provides: "This act shall become effective October 1, 1979, and shall apply to all occurrences involving the acts enumerated above occurring on or after that date."

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only the introductory language and subdivision (3) are set out.

(4)

CASE NOTES

Admissible Evidence of Indignities. — In plaintiff's action for divorce from bed and board, the trial court did not err in admitting into evidence testimony concerning defendant's use of pornographic material in the presence of the parties' minor children, defendant's refusal to provide educational support for one of the parties' adult children, and defendant's sexual advances upon the parties' daughter, since such evidence was relevant to show the circumstances surrounding plaintiff's claim that defendant's acts constituted such indignities to plaintiff's person that her condition was rendered intolerable and her life burdensome. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981).

Examples of Sufficient Cause. —

In plaintiff's action for divorce from bed and board on the ground that defendant had inflicted such indignities upon her as to render her life burdensome, evidence was sufficient to enable the jury to find for plaintiff where it tended to show that at some time prior to 1969 defendant began sleeping and spending the majority of his time in the basement of the parties' home, isolated from plaintiff; upon moving into the basement, defendant withdrew from active participation in the resolution of familial and household problems; defendant viewed hardcore pornographic material in his basement and permitted his minor children to view such material; during 1973 and 1974 defendant requested that plaintiff indulge him in various unnatural sexual desires; and subsequent to 1975 defendant was absent from the parties' home every weekend and all holidays until September 24, 1976, when he left the home for good. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

In all actions for divorce the complaint shall be verified in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148. The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint, and that the facts set forth therein as grounds for divorce, except in actions for divorce from bed and board, have existed to his or her knowledge for at least six months prior to the filing of the complaint: Provided, however, that if the cause for divorce is one-year separation, then it shall not be necessary to allege in the complaint that the grounds for divorce have existed for at least six months prior to the filing of the complaint; it being the purpose of this proviso to permit a divorce after such separation of one year without awaiting an additional six months for filing the complaint: Provided, further, that if the complainant is a nonresident of the State action shall be brought in the county of the defendant's residence, and summons served upon the defendant personally or service of summons accepted by the defendant personally in the manner provided in G.S. 1A-1, Rule 4(j)(1). Notwithstanding any other provision of this section, any suit or action for divorce heretofore instituted by a nonresident of this State in which the defendant was personally served with summons or in which the defendant personally accepted service of the summons and the case was tried and final judgment entered in a court of this State in a county other than the county of the defendant's residence, is hereby validated and declared to be legal and proper, the same as if the suit or action for divorce had been brought in the county of the defendant's residence.

In all divorce actions the complaint shall set forth the name and age of any minor child or children of the marriage, and in the event there are no such minor children of the marriage, the complaint shall so state.

In all prior suits and actions for divorce heretofore instituted and tried in the courts of this State where the averments of fact required to be contained in the affidavit heretofore required by this section are or have been alleged and set forth in the complaint in said suits or actions and said complaints have been duly verified as required by Rule 11 of the Rules of Civil Procedure, said allegations so contained in said complaints shall be deemed to be, and are hereby made, a substantial compliance as to the allegations heretofore required by this section to be set forth in any affidavit; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce.

In all suits and actions for divorce heretofore instituted and tried in this State on and subsequent to the 5th day of April, 1951, wherein the statements, averments, or allegations in the verification to the complaint in said suits or actions are not in accordance with the provisions of Rule 11 of the Rules of Civil Procedure and G.S. 1-148 or the requirements of this section as to verification of complaint or the allegations, statements or averments in the verification contain the language that the facts set forth in the complaint are true "to the best of affiant's knowledge and belief" instead of the language "that the same is true to his (or her) own knowledge" or similar variation in language, said allegations, statements and averments in said verifications as contained in or attached to said complaint shall be deemed to be, and are hereby made, a substantial compliance as to the allegations, averments or statements required by this section to be set forth in any such verifications; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce. (1868-9, c. 93, s. 46; 1869-70, c. 184; Code, s. 1287; Rev., s. 1563; 1907, c. 1008, s. 1; C. S., s. 1661; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4; 1951, c. 590; 1955, c. 103; 1965, c. 636, s. 3; c. 751, s. 1; 1967, c. 50; c. 954, s. 3; 1971, c. 415; 1973, c. 39; 1981, c. 599, s. 15.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added "or service of summons accepted by the defendant personally in the manner provided in G.S. 1A-1, Rule 4(j)(1)" at the end of the second sentence of the first paragraph, and inserted "or in which the defendant personally accepted service of the summons" near the middle of the third sentence of the first paragraph.

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

CASE NOTES

The obvious reason for this requirement, etc. —

In accord with original. See Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

The reason for the requirement of this section for a pleading relating to minor children is to bring to the attention of the court any minor children that might be affected by the divorce, and not to establish jurisdiction. Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

No Conflict with Rule 13(a). — There is no conflict between the statutes dealing with procedure in divorce actions and § 1A-1, Rule 13(a). Rather, Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

The statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in § 1A-1, Rule 13(a). Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

An action for permanent alimony is a permissive counterclaim and is not required to be verified. Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979).

A decree of divorce was not improperly granted because of defective verification of defendant-husband's pleadings, where the counterclaim in which the divorce was prayed for was verified, although the original pleadings were not. Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980).

Applied in Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212 (1981).

§ 50-10. Material facts found by judge or jury in divorce or annulment proceedings; when notice of trial not required; parties cannot testify to adultery; procedure same as ordinary civil actions.

The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury. Nothing herein shall require notice of trial to be given to a defendant who has not made an appearance in the action. The determination of whether there is to be a jury trial or a trial before the judge without a jury shall be made in accordance with G.S. 1A-1, Rules 38 and 39. On such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s. 1564; C. S., s. 1662; 1963, c. 540, ss. 1, 2; 1965, c. 105; c. 636, s. 4; 1971, c. 17; 1973, cc. 2, 460; 1981, c. 12.)

Effect of Amendments. — The 1981 amendment added the second sentence.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Purpose of Section. —

In accord with 1st paragraph in original. See Cobb v. Cobb, 42 N.C. App. 373, 256 S.E.2d 722 (1979).

A summary judgment may not be entered granting an absolute divorce in this State. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

A summary judgment should be entered only where it is shown that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. By virtue of this section the material facts in a divorce action are "deemed denied by the defendant, whether the same shall actually be denied by pleading or not." Thus, in a divorce action the statute creates a genuine issue as to the material facts whether or not the parties raise such an issue and even where they attempt to admit or stipulate the facts. If it is necessary for the court or the jury to find the material facts, as this section makes mandatory in a divorce action, summary judgment may not be entered. Therefore, a divorce decree may not be granted by way of a summary judgment. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Decree by Consent, Stipulation, or Admissions Prohibited. — This section itself raises issues in a divorce action as to all material facts, regardless of whether the parties by their pleadings have raised any issue and even where all material facts are admitted. Thus, this section has the effect of prohibiting entry of a divorce decree by consent, stipulation, or admissions of the parties, and requires instead that all material facts be found, either by a jury where the right to a jury trial has been preserved as provided in § 1A-1, Rules 38 and 39, or by the court in case a jury trial has been waived. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Right to Jury Trial Preserved. — Where the defendant in apt time and manner demanded a jury trial and did not thereafter waive but continued to assert her right to a jury trial, although it may seem futile for defendant to insist upon a trial by jury when, but for this section, no real issue exists, this section gives her the right to do so, and it would be error for the trial court to deny her right to have the facts found in a trial by jury. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Neither Husband nor Wife Is Competent Witness as to Adultery. —

A husband could not be compelled to testify in support of the admissibility of photographs showing him engaged in various acts of adultery in an action by the wife for alimony on the ground of adultery, since the action for alimony without divorce was a divorce action encompassed by the provisions of §§ 8-56 and 50-10 and a husband cannot be compelled to give testimony in support of his wife's allegation that he committed adultery. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

In a divorce action, testimony by a spouse concerning his or her relationship with another party should be excluded under this section when it clearly implies an act of adultery, even though the words "adultery" or "intercourse" are not used. Where there is no clear implication of intercourse, however, the testimony is admissible. Horner v. Horner, 47 N.C. App. 334, 267 S.E.2d 65, cert. denied, 301 N.C. 89, 273 S.E.2d 297 (1980).

Testimony Concerning Indignities Rather than Adultery. — In plaintiff's action for divorce from bed and board, the trial court did not err in allowing plaintiff to testify that defendant began seeing another woman in 1975, that he telephoned this woman from the parties' home, and that from September 1975 until September 24, 1976, the date on which defendant abandoned the parties' home, defendant was gone from the parties' home every weekend and holiday, and there was no merit to defendant's contention that plaintiff's testimony concerning his activities with the other woman was inadmissible because in North Carolina neither spouse is a competent witness to prove the adultery of the other, since plaintiff did not allege defendant's adultery; the issue of adultery was not submitted to the jury; and plaintiff's testimony concerning defendant's activities with the woman was admissible for the purpose of proving the alleged indignities suffered by plaintiff at defendant's hands. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981).

Applied in Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979); Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980).

§ 50-11. Effects of absolute divorce.

(a) After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out, and either party may marry again without restriction arising from the dissolved marriage.

(b) No judgment of divorce shall render illegitimate any child in esse, or begotten of the body of the wife during coverture.

(c) Except in case of divorce obtained with personal service on the defendant spouse, either within or without the State, upon the grounds of the adultery of the dependent spouse, a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before or at the time of the rendering of the judgment for absolute divorce.

(d) A divorce obtained outside the State in an action in which jurisdiction over the person of the dependent spouse was not obtained shall not impair or destroy the right of the dependent spouse to alimony as provided by the laws of this State.

(e) An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.

(f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to an equitable distribution of marital property under G.S.

50-20 if an action or motion in the cause is filed within six months of the date of the divorce. The validity of such divorce, which is a prerequisite to equitable distribution, may be attacked in the action for equitable distribution. (1871-2, c. 193, s. 43; Code, s. 1295; Rev., s. 1569; 1919, c. 204; C. S., s. 1663; 1953, c. 1313; 1955, c. 872, s. 1; 1967, c. 1152, s. 3; 1981, c. 190; c. 815, s. 2.)

Cross References. — As to procedures in actions for equitable distribution of property, see § 50-21.

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, deleted "and except in case of divorce obtained by the dependent spouse in an action initiated by such spouse on the ground of separation for the statutory period" following "the dependent spouse" in subsection (c).

The second 1981 amendment, effective Oct. 1, 1981, added subsections (e) and (f).

Session Laws 1981, c. 815, s. 7, provides that the act shall apply only when the action for an absolute divorce is filed on or after October 1, 1981.

Legal Periodicals. — For article entitled "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Effect on Pending Action for Alimony without Divorce. —

A decree of absolute divorce, granted to the defendant in a prior separate hearing on his counterclaim to an action for alimony without divorce, could not be pled as a bar to the judgment awarding alimony in the subsequent hearing on the plaintiff's claim which initiated the action. Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399, cert. granted, 295 N.C. 549, 248 S.E.2d 726 (1978), aff'd, 296 N.C. 574, 251 S.E.2d 441 (1979).

Decree of Absolute Divorce as Interlocutory Judgment. — A decree of absolute divorce upon a counterclaim to an action for alimony without divorce was not a final judgment as to the remainder of the claims to be adjudicated in the action. Instead, it was merely an interlocutory judgment to become final upon a complete adjudication of all claims, rights and liabilities of the parties. It did not terminate or determine the remaining issues arising from the pleadings in the action. Therefore, the court could amend, modify or rescind it at anytime prior to final judgment. Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399, cert. granted, 295 N.C. 549, 248 S.E.2d 726 (1978), aff'd, 296 N.C. 574, 251 S.E.2d 441 (1979).

A judgment of absolute divorce upon a counterclaim to an action for alimony without divorce, rendered prior to final determination of all issues, was interlocutory and subject to the provisions of § 1A-1, Rule 54(b), for purposes of determining its finality. Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399, cert. granted, 295 N.C. 549, 248 S.E.2d 726 (1978), aff'd, 296 N.C. 574, 251 S.E.2d 441 (1979).

Rights under Consent Judgment Contractual. — Insofar as the consent judgment in the present case imposed a duty of support on defendant-husband beyond that imposed by the common law or by statute, plaintiff-wife's rights did not arise out of the marriage, but out of contract. Haynes v. Haynes, 45 N.C. App. 376, 263 S.E.2d 783 (1980).

As Were Rights to Continued Support under Separation Agreement. — A separation agreement by which the husband agrees to support his wife even after a decree of divorce has been entered which, under this section, would otherwise terminate his obligation, is nonetheless valid. In such a case, the wife's right to continued support does not arise out of the marriage, but arises out of contract and survives the judgment of absolute divorce. Haynes v. Haynes, 45 N.C. App. 376, 263 S.E.2d 783 (1980).

Award Where Plaintiff Unable to Defray Expenses. — An award under either § 50-13.6 for "reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit" or under subsection (c) of this section and § 50-16.4 applying the doctrine of Shore v. Shore, 15 N.C. App. 629, 190 S.E.2d 666 (1972), is appropriate upon a finding by the trial court in the exercise of its discretion that the plaintiff is unable to defray the expense of the suit. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Power of Alabama Court to Modify Alimony Decree. — An Alabama court which had in personam jurisdiction over the parties could modify a North Carolina alimony decree, where the Alabama court in effect found that circumstances had changed since the entry of the North Carolina decree. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

An Alabama court with in personam jurisdiction over the parties could not modify retroactively a North Carolina alimony judgment where there was no showing of any sudden emergency requiring such a reduction. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

Where an Alabama court which had in personam jurisdiction over the parties modified a North Carolina alimony decree, the dependent spouse's right to alimony was terminated as of the entry of the Alabama decree. There was no need to prolong the litigation by requiring the supporting spouse to commence a third proceeding in North Carolina to set aside the prior North Carolina judgment. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

Applied in Webber v. Webber, 32 N.C. App. 572, 232 S.E.2d 865 (1977); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Wise v. Wise, 42 N.C. App. 5, 255 S.E.2d 570 (1979).

Stated in Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

Cited in O'Hara v. O'Hara, 46 N.C. App. 819, 266 S.E.2d 59 (1980); Payne v. Payne, 49 N.C. App. 132, 270 S.E.2d 546 (1980).

§ 50-11.2. Judgment provisions pertaining to care, custody, tuition and maintenance of minor children.

Where the court has the requisite jurisdiction and upon proper pleadings and proper and due notice to all interested parties the judgment in a divorce action may contain such provisions respecting care, custody, tuition and maintenance of the minor children of the marriage as the court may adjudge; and from time to time such provisions may be modified upon due notice and hearing and a showing of a substantial change in condition; and if there be no minor children, the judgment may so state. The jurisdictional requirements of G.S. 50A-3 shall apply in regard to a custody decree. (1973, c. 927, s. 1; 1979, c. 110, s. 11.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added the second sentence.

Session Laws 1979, c. 110, s. 2, contains a severability clause.

Legal Periodicals. — For article entitled "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

CASE NOTES

Standing Not Conferred By § 50-13.1. — When this section and § 50-13.1 are read together as required by the rule of construction of In re Blalock, 233 N.C. 493, 64 S.E.2d 848 (1951), it seems evident that the legislature did not intend that the general grant of standing in § 50-13.1 apply to custody actions in the adoption context, but rather, the clear implication is that § 50-13.1 was intended to apply only in instances where custody disputes arose in the context of separation or divorce. Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 570, 272 S.E.2d 417 (1980), cert. granted, — N.C. —, 274 S.E.2d 230 (1981).

Substantial Change in Condition. — A change in condition is substantial if the change would affect the best interests and welfare of the child. Carmichael v. Carmichael, 40 N.C. App. 277, 252 S.E.2d 257 (1979).

§ 50-11.3. Certain judgments entered prior to January 1, 1981, validated.

Any judgment of divorce which has been entered prior to January 1, 1981, by a court of competent jurisdiction within the State of North Carolina without a conclusion of law that the plaintiff was entitled to an absolute divorce, but which is proper in all other respects, is hereby rendered valid and of full force and effect. (1977, c. 320; 1981, c. 473.)

Effect of Amendments. — The 1981 amendment substituted "January 1, 1981" for "April 1, 1977" near the beginning of the section.

§ 50-12. Resumption of maiden name or adoption of name of prior deceased husband.

Any woman at any time after the bonds of matrimony theretofore existing between herself and her husband have been dissolved by a decree of absolute divorce, may resume the use of her maiden name or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband upon application to the clerk of the court of the county in which she resides, setting forth her intention so to do. Said application shall be addressed to the clerk of the court of the county in which such divorced woman resides, and shall set forth the full name of the former husband of the applicant, the name of the county and state in which the divorce was granted, and the term or session of court at which such divorce was granted, and shall be signed by the applicant in her full maiden name. The clerks of court of the several counties of the State shall record and index such applications in such manner as shall be required by the Administrative Office of the Courts. In every case where a married woman has heretofore been granted a divorce and has, since the divorce, adopted the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband, the adoption by her of such name is hereby validated. In the complaint, or a counterclaim for divorce filed by any woman in this State, she may petition the court for a resumption of her maiden name or the adoption by her of the name of a prior deceased husband, or of a name composed of her given name and the surname of a prior deceased husband, and, the court is authorized to incorporate in the divorce decree an order authorizing her to resume her maiden name or to adopt the name of a prior deceased husband or a name composed of her given name and the name of a prior deceased husband. (1937, c. 53; 1941, c. 9; 1951, c. 780; 1957, c. 394; 1971, c. 1185, s. 23; 1981, c. 494, ss. 1-4.)

Cross References. — As to effect of changing name upon registration to vote, see § 163-69.1.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "county and state in which the divorce" for "county in which said divorce" in the second sentence, deleted the former fourth sentence, which read "The provisions of this section shall apply only in those cases in which the divorce decree is rendered by a court of competent jurisdiction of this State," substituted "In the complaint, or a counterclaim for divorce filed by any woman in this State" for "Provided that in the complaint or crossbill for divorce filed by any woman" at the beginning of the last sentence and deleted "upon the granting of the divorce in her favor" preceding "the court is authorized" in the last sentence.

OPINIONS OF ATTORNEY GENERAL

Wife Must Have Filed Complaint or Counter claim. — The court may not grant in the divorce decree authorization for the wife to resume her maiden name unless the wife filed the complaint for divorce or a counterclaim (cross bill) for divorce. See opinion of Attorney General to the Honorable John H. Parker, District Court Judge, 10th Judicial District, 50 N.C.A.G. 16 (1980).

§ 50-13.1. Action or proceeding for custody of minor child.

CASE NOTES

Grant of Standing Does Not Apply to Adoption Proceedings. — When § 50-11.2 and this section are read together as required by the rule of construction of In re Blalock, 233

N.C. 493, 64 S.E.2d 848 (1951), it seems evident that the legislature did not intend that the general grant of standing in this section apply to custody actions in the adoption context, but rather the clear implication is that this section was intended to apply only in instances where custody disputes arose in the context of separation or divorce. Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 570, 272 S.E.2d 417 (1980), cert. granted, — N.C. —, 274 S.E.2d 230 (1981).

Claim Not Precluded by Consent to Adoption. — Where petitioner signed a consent to the adoption of his children by their grandparents, the petitioner was rendered a stranger to the blood, but this in no way precludes his right to claim custody as an "other person" within the meaning of this section. In re Rooker, 43 N.C. App. 397, 258 S.E.2d 828 (1979).

Effect of Foreign Adjudication of Paternity. — See Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977).

Cited in Acker v. Barnes, 33 N.C. App. 750, 236 S.E.2d 715 (1977); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640 (1979).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child. An order awarding custody must contain findings of fact which support the determination by the judge of the best interest of the child. Provided, between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child.

(b) An order for custody of a minor child may grant exclusive custody of such child to one person, agency, organization or institution, or, if clearly in the best interest of the child, provide for custody in two or more of the same, at such times and for such periods as will in the opinion of the judge best promote the interest and welfare of the child.

(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court. (1957, c. 545; 1967, c. 1153, s. 2; 1977, c. 501, s. 2; 1979, c. 967; 1981, c. 735, ss. 1, 2.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1977, added the third sentence of subsection (a).

The 1979 amendment, effective July 1, 1979, added the second sentence of subsection (a).

Session Laws 1977, c. 501, s. 3, provides that the act shall not affect pending litigation.

The 1981 amendment added subsection (b1).

Legal Periodicals. — For article entitled "Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents," see 1976 Duke L.J. 911.

For article entitled "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

The welfare of the child, etc. —

In accord with 18th paragraph in original. See Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

In custody determinations, the best interest of the child is the overriding factor. Wilson v. Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979).

The trial court should be primarily concerned with the welfare of the child in deciding which party before it should be charged with the enormous responsibilities of custodianship of the child. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

But Trial Court Has Wide Discretion. —

In accord with 3rd paragraph in original. See Wilson v. Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979).

In accord with 5th paragraph in original. See Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979).

The trial judge is vested with broad discretion since he is in a position to see and hear the parties and witnesses. Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

The trial judge's decision as to custody will not be upset, in the absence of a clear abuse of discretion, if the findings are supported by competent evidence. Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979).

Where trial judge enters a custody order that in his judgment is in the best interest of the child, the appellate division should not reverse that judgment and hold that, as a matter of law, the trial judge is obliged to have reached a different opinion in the absence of a clear showing of abuse of discretion. Decisions in custody cases are never easy, and the trial judge has the opportunity to see the parties in person and to hear the witnesses. He can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges. Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979).

To support an award of visitation rights, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977); In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

Parents Have Right to Custody. —

The natural parent is presumed to be the appropriate custodian of his or her child as opposed to third persons and should not be deprived of custody merely because the child could be better cared for in a material sense. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

Effect of Prior Order of Incompetence. — In a controversy between husband and wife for custody of minor children of the marriage, it is error for the trial court to award custody to the husband on the sole ground that the wife has prior to the time been judged mentally incompetent. A prior court order which judicially declares a parent to be incompetent is not sufficient in and of itself to establish a parent's present unfitness to have a child or children; rather this section requires a full, factual determination of all the circumstances in the case before a proper order may be entered by the court. Price v. Price, 42 N.C. App. 66, 255 S.E.2d 652 (1979).

Or Separation Agreement. —

When a case is properly before it, the court has the duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court. Thus, the existence of a valid separation agreement containing provisions relating to the custody and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial determination of those same matters. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Though Presumption Exists, etc. — There is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon in a separation agreement is just and reasonable. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

But provisions of a valid separation agreement, etc. —

A valid separation agreement cannot be ignored or set aside by the court without the consent of the parties. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Custody May Be Granted to Third Person. —

While the fitness of a natural parent is of paramount significance in determining the best interests of the child in custody contests, it is not always determinative in itself. It is entirely possible that a natural parent may be a fit and proper person to care for the child but that all other circumstances dictate that the best interests of the child would be served by placing custody in a third party. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

The trial judge is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

While it is presumed that it is in the child's best interest to be placed with a natural parent, this presumption may be rebutted by a circumstance which would substantially affect the child. Wilson v. Williams, 42 N.C. App. 348, 256 S.E.2d 516 (1979).

Homosexual Father's Visitation Rights. — The trial court did not err in granting a father who is homosexual unsupervised overnight visitation rights with his minor son. Woodruff v. Woodruff, 44 N.C. App. 350, 260 S.E.2d 775 (1979).

Trial Court Must Make, etc. —

In accord with 3rd paragraph in original. See Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party will best promote the interest and welfare of the child. Findings of fact as to the characteristics of the competing parties must be made to support the necessary conclusion of law. These findings may concern physical, mental, or financial fitness or any other factors brought out of the evidence and relevant to the issue of the welfare of the child. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

When the court fails to find facts so that Court of Appeals can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact. In re Kowalzek, 37 N.C. App. 364, 246 S.E.2d 45, cert. denied, 295 N.C. 734, 248 S.E.2d 863 (1978).

Such Findings Are Conclusive, etc. —

In accord with 1st paragraph in original. See Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976).

Applied in Stanback v. Stanback, 31 N.C. App. 174, 229 S.E.2d 693 (1976).

§ 50-13.3. Enforcement of order for custody.

(a) An order providing for the custody of a minor child is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes.

(1977, c. 711, s. 26.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1978, rewrote subsection (a).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

Trial Court Must Find Defendant Possessed Means to Comply. —

In a contempt proceeding for violation of a custody order, no specific finding was required of the trial court as to the defendant's present ability to comply with the order, although there was in fact plenary evidence introduced to justify such a finding. Lee v. Lee, 37 N.C. App. 371, 246 S.E.2d 49 (1978).

Facts Not Reviewable Except upon Their Sufficiency. —

In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

In contempt proceedings, findings by the trial court with regard to whether a party willfully and without sufficient legal excuse or justification violated the terms of a custody order are conclusive on appeal when supported by competent evidence. Lee v. Lee, 37 N.C. App. 371, 246 S.E.2d 49 (1978).

Order Holding Plaintiff in Contempt Is Appealable. — Plaintiff was entitled to appeal the order of the trial court finding that she was in contempt of child custody orders even though the trial court withheld punishment and only made the findings a part of the record, since withholding punishment without further limitation is to retain the right to impose it in the future. Under such circumstances the order holding the plaintiff in contempt affected a substantial right and was therefore appealable. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

No Authority of Court to Modify Father's Visitation Rights. — The trial court was without authority to transform a show cause hearing on the matter of a wife's alleged contempt in failing to comply with a custody order, on its own motion and without notice to the wife, into a hearing on the issue of modification of the father's visitation rights as set forth in prior orders. Lee v. Lee, 37 N.C. App. 371, 246 S.E.2d 49 (1978).

Applied in Morris v. Morris, 42 N.C. App. 222, 256 S.E.2d 302 (1979).

§ 50-13.4. Action for support of minor child.

(a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.

(b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support. However, the judge may not order support to be paid by a person who is not the child's parent or an agency, organization or institution standing in loco parentis absent evidence and a finding that such person, agency, organization or institution has voluntarily assumed the obligation of support in writing. The preceding sentence shall not be construed to prevent any court from ordering the support of a child by an agency of the State or county which agency may be responsible under law for such support.

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

(d) Payments for the support of a minor child shall be ordered to be paid to the person having custody of the child or any other proper person, agency, organization or institution, or to the court, for the benefit of such child.

(e) Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.

(f) Remedies for enforcement of support of minor children shall be available as herein provided.

(1) The court may require the person ordered to make payments for the support of a minor child to secure the same by means of a bond, mortgage or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the execution of an assignment of wages, salary or other income due or to become due.

(2) If the court requires the transfer of real or personal property or an interest therein as provided in subsection (e) as a part of an order for payment of support for a minor child, or for the securing thereof, the court may also enter an order which shall transfer title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(3) The remedy of arrest and bail, as provided in Article 34 of Chapter 1 of the General Statutes, shall be available in actions for child-support payments as in other cases.

(4) The remedies of attachment and garnishment, as provided in Article 35 of Chapter 1 of the General Statutes, shall be available in an action for child-support payments as in other cases, and for such purposes the child or person bringing an action for child support shall be deemed a creditor of the defendant. Additionally, in accordance with the provisions of G.S. 110-136, a continuing wage garnishment proceeding for wages due or to become due may be instituted by motion in the original child support proceeding or by independent action through the filing of a petition.

(5) The remedy of injunction, as provided in Article 37 of Chapter 1 of the General Statutes and G.S. 1A-1, Rule 65, shall be available in actions for child support as in other cases.

(6) Receivers, as provided in Article 38 of Chapter 1 of the General Statutes, may be appointed in actions for child support as in other cases.

(7) A minor child or other person for whose benefit an order for the payment of child support has been entered shall be a creditor within the meaning of Article 3 of Chapter 39 of the General Statutes pertaining to fraudulent conveyances.

(8) A judgment for child support shall not be a lien against real property unless the judgment expressly so provides, sets out the amount of the lien in a sum certain, and adequately describes the real property affected; but past due periodic payments may by motion in the cause or by a separate action be reduced to judgment which shall be a lien as other judgments.

(9) An order for the payment of child support is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes.

(10) The remedies provided by Chapter 1 of the General Statutes, Article 28, Execution; Article 29B, Execution Sales; and Article 31, Supplemental Proceedings, shall be available for the enforcement of judgments for child support as in other cases, but amounts so payable shall not constitute a debt as to which property is exempt from execution as provided in Article 32 of Chapter 1 of the General Statutes.

(11) The specific enumeration of remedies in this section shall not constitute a bar to remedies otherwise available. (1967, c. 1153, s. 2; 1969, c. 895, s. 17; 1975, c. 814; 1977, c. 711, s. 26; 1979, c. 386, s. 10; 1981, c. 472; c. 613, ss. 1, 3.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1978, rewrote subdivision (f)(9).

The 1979 amendment rewrote the second sentence of subdivision (f)(4), which formerly read: "In addition, an independent garnishment proceeding, as provided in G.S. 110-136, shall be available for enforcement of child-support obligations."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

The first 1981 amendment inserted "or possession of" in the first sentence of subsection (e).

The second 1981 amendment, in subsection (b), rewrote the first sentence, deleted "Upon proof of such circumstances" at the beginning of the third sentence and added the fourth and fifth sentences. The amendment also inserted "the child care and homemaker contributions of each party," near the end of subsection (c). Session Laws 1981, c. 613, s. 2, provides: "This act shall apply to all hearings and trials conducted after the date of ratification and shall not affect the validity of any existing order or judgment." The act was ratified June 18, 1981.

Legal Periodicals. — For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For note on the remedy of garnishment in child support, see 56 N.C.L. Rev. 169 (1978).

For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Father Primarily Liable, etc. —

This section imposes upon the father the primary duty to support the child, the mother's obligation being secondary. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976); Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

Mother May Have Duty of Contribution. — Under subsection (b) of this section, the duty of the father to provide support is primary. However, the mother also may have a duty of contribution upon proof of proper circumstances. Coble v. Coble, 44 N.C. App. 327, 261 S.E.2d 34 (1979), rev'd on other grounds, 300 N.C. 708, 268 S.E.2d 185 (1980).

Taken together, subsections (b) and (c) of this section clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. Thus, where the father cannot reasonably be expected to bear all the expenses necessary "to meet the reasonable needs of the child[ren]," this court has both the authority and the duty to order that the mother contribute supplementary support to the degree that she is able. Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980).

And Court Need Not Find Father Unable to Bear Support Burden Alone. — This section does not require a finding by the trial court that the father is unable to bear the support burden alone prior to ordering payments by the child's mother. In re Register, 49 N.C. App. 65, 270 S.E.2d 507 (1980).

Standing of Mother to Bring Claims. — Since parental claims for both loss of services and medical expenses are based upon the parental support obligation, and since the mother has a legal obligation to support her child, even if secondary, a mother who has custody of the child and provides at least one-half of the child's support including some of the child's medical expenses should have standing to bring such claims. Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980).

Separation Agreements Are Not Binding, etc. —

Any separation agreement dealing with the custody and the support of the children of the parties cannot deprive the court of its inherent as well as statutory authority to protect the interests of and provide for the welfare of minors. McKaughn v. McKaughn, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

Valid separation agreements relating to marital and property rights of the parties are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. Perry v. Perry, 33 N.C. App. 139, 234 S.E.2d 449, cert. denied, 292 N.C. 730, 235 S.E.2d 784 (1977).

When a case is properly before it, the court has the duty to award custody in accordance with the best interests of the child, and no agreement, consent or condition between the parents can interfere with this duty or bind the court. Thus, the existence of a valid separation agreement containing provisions relating to the custody and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial determination of those same matters. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

But Separation Agreement Cannot Be Ignored. —

A valid separation agreement cannot be ignored or set aside by the court without the consent of the parties. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Amount Set by Agreement, etc. —

There is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon in a valid separation agreement is just and reasonable. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979).

Where parties to a separation agreement agree concerning the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the provisions mutually agreed upon are just and reasonable, and the court is not warranted in ordering a change in the absence of any evidence of a change in conditions. McKaughn v. McKaughn, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

When Agreement May Be Modified. — A separation agreement is a contract between the parties and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where rights of third parties have not intervened. McKaughn v. McKaughn, 29 N.C. App. 702, 225 S.E.2d 616 (1976).

A parent may contract to support his or her children past the age of majority and the court has power to enforce such a contract just as it would any other. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

But Court Cannot Enlarge on Such Obligations. — Since the duty to support after the age of majority arises in contract, however, the court may not enlarge upon the obligation agreed to by the parties. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

Any attempt by the court to enlarge upon the obligations arising under contract by extending the duty of support beyond the age of majority would be void for lack of subject matter jurisdiction. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

When separated spouses who have executed a separation agreement resume living together, they hold themselves out as man and wife in the ordinary meaning of that phrase, and irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinds their separation agreement insofar as it has not been executed; and further, a subsequent separation will not revive the agreement. Hand v. Hand, 46 N.C. App. 82, 264 S.E.2d 597, cert. denied, 300 N.C. 556, 270 S.E.2d 107 (1980).

Where a reconciliation and resumption of cohabitation has taken place, an order or separation agreement with provisions for future support and an agreement to live apart is necessarily abrogated. Hand v. Hand, 46 N.C. App. 82, 264 S.E.2d 597, cert. denied, 300 N.C. 556, 270 S.E.2d 107 (1980).

The issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation where the evidence is conflicting. Hand v. Hand, 46 N.C. App. 82, 264 S.E.2d 597, cert. denied, 300 N.C. 556, 270 S.E.2d 107 (1980).

Basis for Order for Child Support. — An order for child support under this section must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980); In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

Ability to Pay Considered. —

In determining the amount of support the court must take into consideration the needs of the children and the ability of the defendant to pay during the time for which reimbursement is sought. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

The court must consider not only the needs of the wife and children but the estate and earnings of both husband and wife. Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978).

An order for child support must be based not only on the needs of the child but also on the ability of the father to meet the needs. Poston v. Poston, 40 N.C. App. 210, 252 S.E.2d 240 (1979).

Present Earnings, etc. —

Ordinarily the husband's ability to pay is determined by his income at the time the award is made if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

The amount of child support awarded should be based on the husband's actual income if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. Whitley v. Whitley, 46 N.C. App. 810, 266 S.E.2d 23 (1980).

Capacity to earn may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

And Failure to Identify Purposes, etc. —

In accord with original. See Martin v. Martin, 35 N.C. App. 610, 242 S.E.2d 393, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

Finding Where Award Based on Capacity to Earn. —

Only where there are findings, based on competent evidence, to support a conclusion that the supporting spouse or parent is deliberately depressing his or her income to avoid family responsibilities can the "earning capacity" rule be applied. Whitley v. Whitley, 46 N.C. App. 810, 266 S.E.2d 23 (1980).

Conclusion as to Reasonableness of Personal Expenses. — The trial court in a child support case should be satisfied that personal expenses itemized in the parties' balance sheets are reasonable under all the circumstances before making a determination of need or liability, and though a lack of a specific conclusion as to reasonableness will not necessarily be held for error, the better practice is for the order to contain such a conclusion. Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980).

There is no limitation as to time within which actions for the support of legitimate children must be commenced. County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 264 S.E.2d 816 (1980).

Award Where Father Has Substantial Income. — In an action for child support, the court, in making its award, should keep in mind that children of a man of substantial income are entitled to live accordingly. McLeod v. McLeod, 43 N.C. App. 66, 258 S.E.2d 75, cert. denied, 298 N.C. 807, 261 S.E.2d 920 (1979).

Award of Homeplace. — The award of the homeplace does not constitute a writ of possession within the meaning of § 50-17 and the trial judge may award exclusive possession of the homeplace, even though owned by the entirety, as a part of support under this section. Arnold v. Arnold, 30 N.C. App. 683, 228 S.E.2d 48 (1976); Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

The General Assembly has made statutory provisions in subdivision (f)(2) for awarding possession of a home as a part of child support. This is true without regard to whether the parties are divorced. To the extent the General Assembly's will, as expressed in this section, conflicts with the common-law principle that the husband is entitled to exclusive possession of entirety property, the common law has been abrogated and supplanted. Martin v. Martin, 35 N.C. App. 610, 242 S.E.2d 393, cert. denied, 295 N.C. 261, 245 S.E.2d 778 (1978).

Granting of Credit Towards Payment of Court-Ordered Child Support for Voluntary Expenditures. — See Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

To support an award of payment for support, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the support payments ordered are in "such amount as to meet the reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular care." Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977); Poston v. Poston, 40 N.C. App. 210, 252 S.E.2d 240 (1979).

Where the court does not make appropriate findings based on competent evidence as to what are the reasonable needs of the children for health, education and maintenance, it is error to direct payments for their support. Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); Poston v. Poston, 40 N.C. App. 210, 252 S.E.2d 240 (1979).

In orders of child support, the court should make findings of specific facts (e.g. incomes, estates) to support a conclusion as to the relative abilities of the parties to provide support. To determine the amount of support necessary to meet the reasonable needs of the child for health, education and maintenance (which are conclusions of law), the court must make findings of specific facts as to what actual past expenditures have been. Where past expenditures are below subsistence, due regard, of course, must be given to meeting the reasonable needs of the child. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

Court Has Broad Discretion under Subsection (e). — The court is not limited to ordering one method of payment to the exclusion of the others provided in subsection (e). The legislature's use of the disjunctive and the phrase "as the court may order" shows that the court is to have broad discretion in providing for payment of child support orders. Moore v. Moore, 35 N.C. App. 748, 242 S.E.2d 642 (1978).

Award Not Disturbed Unless Discretion Abused. —

The amount of child support awarded is in the discretion of the trial judge and will be disturbed only on a showing of abuse of that discretion. Wyatt v. Wyatt, 32 N.C. App. 162, 231 S.E.2d 42, aff'd, 35 N.C. App. 650, 242 S.E.2d 180 (1977).

Custodial Parent as Real Party in Interest. — If the custodial parent provides support which the other parent was legally obligated to provide, then the custodial parent is a real party in interest in an action to recover the support so provided. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

The determination of child support must be done in such way as to result in fairness to all parties. Walker v. Walker, 38 N.C. App. 226, 247 S.E.2d 615 (1978).

Recovery of Past Due Payments. — The fact that a child becomes 18 years of age does not prevent the parent having custody from having the past due payments which accrued while the child was a minor reduced to judgment. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

A parent having custody of a minor child may institute an action for the support of such child, and once an order for support has been obtained, the past due payments may be reduced to judgment by motion in the cause. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

The defendant in an action for unpaid child support could not complain of inadequate notice of the plaintiff's motion to reduce to judgment support payments alleged to be in arrears where the defendant's attorney of record was properly served with notice. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

Measure of Liability for Reimbursement of Support Funds Expended. — Where there is no evidence or finding as to the actual amount expended by plaintiff for the support of the children for which she is entitled to reimbursement from defendant, what the defendant "should have paid" is not the measure of his liability to plaintiff. The measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represents the defendant's share of support. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

No Reimbursement for Share of Support Determined by Court. — In an action by a mother for child support, she is not entitled to be reimbursed for sums expended by her for the support of the children which represent her share of support as determined by the trial judge, considering the relative ability of the parties to provide support. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

Mother not Entitled to Compensation for Support by Others. — In an action by a mother for child support, she is not entitled to be compensated for support for the children provided by others. Hicks v. Hicks, 34 N.C. App. 128, 237 S.E.2d 307 (1977).

Court Cannot Create Savings Account for Use of Children. — In an action for child support, the court was without the power to, in effect, attempt to create a savings account for the use of the children after they reach legal maturity at the age of 18. Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978).

Trial Court Must Find Defendant Possessed Means to Comply. —

In order to hold a parent in contempt for failure to pay child support in accordance with a decree, the failure must be willful. In order to find the failure willful, there must be particular findings of the ability to pay during the period of delinquency. Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

Appellate Review, etc. —

In determining the amount of alimony and child support to be awarded, the trial judge must follow the requirements of this section. The amount is a reasonable subsistence, to be determined by the trial judge in the exercise of a judicial discretion from the evidence before him. His determination is reviewable, but it will not be disturbed in the absence of a clear abuse of discretion. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

The trial court's discretion as to the amount of child support awarded is not absolute and unreviewable. The order must be based not only on the needs of the child but also on the ability of the father to meet the needs. But where there is a finding of ability to pay supported in the record by competent evidence, that finding will be conclusive. Wyatt v. Wyatt, 32 N.C. App. 162, 231 S.E.2d 42, aff'd, 35 N.C. App. 650, 242 S.E.2d 180 (1977).

Applied in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979); Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980); Lane v. Aetna Cas. & Sur. Co., 48 N.C. App. 634, 269 S.E.2d 711 (1980).

Stated in Stanback v. Stanback, 31 N.C. App. 174, 229 S.E.2d 693 (1976); Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981).

Cited in Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 570, 272 S.E.2d 417 (1980).

§ 50-13.5. Procedure in actions for custody or support of minor children.

(a) Procedure. — The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19. In this G.S. 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

(b) Type of Action. — An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.
(2) Repealed by Session Laws 1979, c. 110, s. 12, effective July 1, 1979.
(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.
(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.
(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.
(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.
(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. —

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.
(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-3.
(3) to (6) Repealed by Session Laws 1979, c. 110, s. 12, effective July 1, 1979.

(d) Service of Process; Notice; Interlocutory Orders. —

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on five days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-4.
(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(e) Notice to Additional Persons in Support Actions and Proceedings; Intervention. —

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the support of such child, shall be given notice by the party raising the issue of support.
(2) The notice herein required shall be in the manner provided by the Rules of Civil Procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.
(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.
(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue. — An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes. — Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(h) Court Having Jurisdiction. — When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time.

(i) District Court; Denial of Parental Visitation Right; Written Finding of Fact. — In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

(j) Custody and Visitation Rights of Grandparents. — In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. (1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C. S., ss. 1664, 1667, 2242; 1921, c. 13; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1971, c. 1185, s. 24; 1973, c. 751; 1979, c. 110, s. 12; c. 563; c. 709, s. 3; 1981, c. 735, s. 3.)

Effect of Amendments. — The first 1979 amendment, effective July 1, 1979, deleted the former second sentence of subsection (a), relating to procedure in habeas corpus proceedings for custody and support, deleted subdivision (2) of subsection (b), which read: "By writ of habeas corpus, and the parties may appeal from the final judgment therein as in civil actions." In subsection (c), the amendment rewrote subdivision (2) and deleted subdivisions (3), relating to adjudication of rights where the minor child is not before the court, (4), providing that jurisdiction should not be divested by a change in circumstances, and (5), relating to dismissal of the proceeding or retention of jurisdiction where a court in another state has assumed jurisdiction. In subsection (d), the amendment rewrote subdivision (1), and in subsection (e), the amendment substituted "Support" for "Custody" in the catchline and "support" for "custody" in two places near the end of subdivision (1) and in subdivision (4).

The second 1979 amendment added subsection (j).

The third 1979 amendment, effective July 1, 1979, substituted "as provided in this section and in G.S. 50-19" for "as herein provided" at the end of the first sentence of subsection (a).

Session Laws 1979, c. 110, s. 2, contains a severability clause.

The 1981 amendment, in subsection (j), substituted "determined upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7" for "awarded to a parent and subsequently that parent dies" and substituted "are" for "on the side of the deceased parent may intervene in the action and shall be" preceding "entitled."

Legal Periodicals. — For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

No Conflict with Rule 13(a). — There is no conflict between the statutes dealing with procedure in divorce actions and § 1A-1, Rule 13(a). Rather Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

The statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in § 1A-1, Rule 13(a). Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

Application of Subsection (f). —

The first proviso of subsection (f), when read in conjunction with the first sentence of subsection (f) and in conjunction with subsection (b), makes it clear that after final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. Kennedy v. Surratt, 29 N.C. App. 404, 224 S.E.2d 215 (1976).

When a divorce action has been filed in one county, and there has not been a final judgment in that action, the courts of another county are, by virtue of the first proviso in subsection (f) of this section, without jurisdiction to entertain an independent action for custody of the minor children of the parties. Holbrook v. Holbrook, 38 N.C. App. 303, 247 S.E.2d 923 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

The findings of the court as to the residence of the parties are conclusive when supported by any competent evidence. Holbrook v. Holbrook, 38 N.C. App. 303, 247 S.E.2d 923 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Jurisdiction of Court in Which Divorce Suit, etc. —

The court in which the suit for divorce is pending has exclusive jurisdiction of proceedings for custody and child support, and once they are commenced, maintains it after the divorce decree is entered. Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

Jurisdiction of Divorce Court Continues after Divorce. —

In accord with 2nd paragraph in original. See Morris v. Morris, 42 N.C. App. 222, 256 S.E.2d 302 (1979).

In a child custody proceeding the court has continuing jurisdiction to do anything necessary at any time to supervise the welfare of the minor child, though the child is not actually before the court. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

And Issue of Custody and Support Remains in Fieri. —

In accord with original. See Bass v. Bass, 43 N.C. App. 212, 258 S.E.2d 391 (1979).

If custody and support had been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains in fieri until the children have become emancipated. Kennedy v. Surratt, 29 N.C. App. 404, 224 S.E.2d 215 (1976).

Court Has Inherent Authority to Make Temporary Orders. —

Subsection (d)(2) of this section clearly gives the court having jurisdiction over the child the authority to enter orders for temporary custody pending service of process. Broaddus v. Broaddus, 45 N.C. App. 666, 263 S.E.2d 842 (1980). See also Lynch v. Lynch, 45 N.C. App. 391, 264 S.E.2d 114 (1980), aff'd in part and rev'd in part, — N.C. —, 274 S.E.2d 212 (1981).

Binding Effect of Temporary Order on Defendant. — The trial court had authority to enter an order for the temporary custody of a minor child who was physically present in this State, but such order was not binding on defendant since she was not served with summons prior to its entry. Lynch v. Lynch, 45 N.C. App. 391, 264 S.E.2d 114 (1980), aff'd in part and rev'd in part, — N.C. —, 274 S.E.2d 212 (1981).

Temporary Order Not Rendered Null and Void. — Clearly, under subsection (e)(3) of this section, the fact that defendant was not served prior to the court's entering the temporary order will not thereby render such order null and void. Broaddus v. Broaddus, 45 N.C. App. 666, 263 S.E.2d 842 (1980).

Jurisdiction Is Acquired When Child Is "Physically Present". —

The minor child's physical presence in this State is sufficient to confer jurisdiction upon the courts to modify foreign custody decrees. King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979).

State Court May Yield, etc. —

A trial court, either in exercising or refusing to exercise jurisdiction, must make findings of fact regarding the best interests of the child. Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

Custody Decree of Another State, etc. —

The Full Faith and Credit Clause does not conclusively bind the North Carolina courts to give greater effect to a decree of another state than it has in that state, or to treat as final and conclusive an order of a sister state which is interlocutory in nature. Johnston v. Johnston, 29 N.C. App. 345, 224 S.E.2d 276 (1976).

Adultery. —

In accord with 4th paragraph in original. See Hunt v. Hunt, 29 N.C. App. 380, 224 S.E.2d 270 (1976).

To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

To support an award of visitation rights, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that the party is a fit person to visit the child and that such visitation rights are in the best interest of the child. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

Abandonment as Ground to Deny Visitation Rights. — The general rule is that abandonment, by itself, does not constitute sufficient ground to deny visitation rights completely, and this rule is in accord with the principle adopted by the courts that the purpose of denying custody or visitation rights is not to punish the noncustodial parent. Johnson v. Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

Findings Required Where Severe Restrictions Placed on Visitation Rights. — Where severe restrictions are placed on a parent's visitation rights with his child, there should be some finding of fact, supported by competent evidence in the record, warranting such restrictions. Johnson v. Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

Where hostilities exist between estranged parents, it may be difficult for the noncustodial parent to maintain a relationship with his or her child when required to exercise visitation only in the presence of the other parent or a member of the other parent's family who may share such hostilities. There are, of course, circumstances warranting such restrictions, but if they are imposed, they must be based on appropriate factual findings. Johnson v. Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

Findings Held Insufficient. — The trial court's findings in a child custody proceeding that respondent mother had abandoned her child and that it would not be in the best interests of the child for him to be carried back and forth between North Carolina, home of the father, and New Jersey, home of the mother, were insufficient to support the trial court's order restricting respondent's visiting privileges, which were limited to one weekend a month, to occasions only when petitioner father or his designated representative was present. Johnson v. Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

Effect of Appeal. —

While an appeal from an order providing for the custody of a minor child removes the cause from the trial court to the appellate court, and pending the appeal the trial court is without jurisdiction to punish for contempt, taking an appeal does not authorize a violation of the custody order. If the custody order is upheld by the appellate court, the violation may be inquired into when the cause is remanded to the trial court. Sturdivant v. Sturdivant, 31 N.C. App. 341, 229 S.E.2d 318 (1976).

Weight of Decision of Trial Court. —

The decision of the trial judge in child custody proceedings ought not to be upset on appeal absent a clear showing of abuse of discretion. King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979).

Applied in Benson v. Benson, 39 N.C. App. 254, 249 S.E.2d 877 (1978); Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Rhoney v. Sigmon, 43 N.C. App. 11, 257 S.E.2d 691 (1979); Misero v. Misero, 43 N.C. App. 523, 259 S.E.2d 346 (1979); Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212 (1981).

Cited in Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Holbrook v. Holbrook, 38 N.C. App. 308, 247 S.E.2d 926 (1978); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 570, 272 S.E.2d 417 (1980).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

Legal Periodicals. — For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Requirement of Insufficient Means. — Before attorney's fees may be awarded in an alimony case to the dependent spouse under §§ 50-16.3 and 50-16.4 and before attorney's fees may be awarded to the interested party in a custody, support, or custody and support suit under this section, that person must have insufficient means to defray the expense of the suit; that is, as interpreted by cases of the Supreme Court of this State, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Sufficient Allegations of Insufficient Means. — Allegations that the plaintiff was the dependent spouse and that she had insufficient means to support the children during the pendency of the suit were sufficient to support an award of counsel fees under this section. Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

This section applies to a proceeding to compel the future support of the child. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

And not to a proceeding to compel reimbursement for past payments made by a person secondarily liable for such child's support. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

The amount awarded, etc. —

The trial court's determination of attorney fees is binding on the appellate courts in the absence of abuse of discretion. Wyche v. Wyche, 29 N.C. App. 685, 225 S.E.2d 626, cert. denied, 290 N.C. 668, 228 S.E.2d 459 (1976).

When the statutory requirements for a custody suit or a custody and support suit have been met, the amount of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Proof Required to Support Award in Custody, and Custody and Support Suits. — In a custody suit or a custody and support suit, the trial judge, pursuant to the first sentence in this section, has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved to support an order for attorney's fees. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

The partial listing of legal expenses is an insufficient finding of fact as to the reasonable worth of attorney's fees. Wyatt v. Wyatt, 32 N.C. App. 162, 231 S.E.2d 42, aff'd, 35 N.C. App. 650, 242 S.E.2d 180 (1977).

Court Abused Discretion. —

In accord with original. See Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

Findings of Fact Must Support Order. —

In an action for custody and support, findings of fact are not required to sustain an award for counsel fees. Walker v. Walker, 38 N.C. App. 226, 247 S.E.2d 615 (1978).

The trial court erred in failing to make findings of fact as to the reasonableness of the attorney's fees incurred by the plaintiff after requesting and receiving a detailed affidavit from the plaintiff's counsel setting forth the nature and scope of the legal services. Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

Second Sentence of Section, etc. —

The requirement of a finding that the party ordered to pay support has refused to provide support applies only in support actions and not in custody or custody and support actions. Arnold v. Arnold, 30 N.C. App. 683, 228 S.E.2d 48 (1976).

Findings of fact are not required to support an award of attorney's fees in an action for custody and support. Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977).

Reviewable Question of Law in Custody, and Custody and Support Suits. — Whether the requirements of this section for a custody suit or a custody and support suit have been met is a question of law reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Reviewable Question of Law in Support Suit. — A finding of fact supported by competent evidence must be made on the issue of whether the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding, in addition to meeting the requirements of "good faith" and "insufficient means" before attorney's fees may be awarded in a support suit. This issue is a question of law, reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Award of Fees by Appellate Court. — Neither this section nor any other statute authorizes an appellate court to make an award of attorney's fees. Tilley v. Tilley, 30 N.C. App. 581, 227 S.E.2d 640 (1976).

Award of Fees Vacated. — The trial court could not order the defendant to pay plaintiff's attorney for the time spent in representing her on a contempt citation stemming from her violation of the defendant's court-ordered visitation rights. Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

Applied in Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Cited in Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640 (1979).

§ 50-13.7. Modification of order for child support or custody.

(a) An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. Subject to the provisions of G.S. 50A-3, an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

(b) When an order for support of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support which modifies or supersedes such order for support. Subject to the provisions of G.S. 50A-3, when an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody. (1858-9, c. 53; 1868-9, c. 116, s. 36; 1871-2, c. 193, s. 46; Code, ss. 1296, 1570, 1661; Rev., ss. 1570, 1853; C. S., ss. 1664, 2241; 1929, c. 270, s. 1; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1953, c. 813; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1979, c. 110, s. 13; 1981, c. 682, s. 12.)

Cross References. — As to distribution by court of marital property upon divorce, see § 50-20.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted references to custody in the first sentences of subsections (a) and (b) and added the second sentences of subsections (a) and (b).

Session Laws 1979, c. 110, s. 2, contains a severability clause.

The 1981 amendment, effective July 1, 1981, substituted "custody" for "support" at the end of the second sentence of subsection (b).

Legal Periodicals. — For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

The welfare of the children in controversies involving custody, etc. —

The welfare of the child is the polar star by which the courts must be guided in awarding custody. Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

The welfare of the child, not the frustration of the court order is the determinative factor. Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980).

The control and custody of minor children cannot be determined finally. —

In accord with 4th paragraph in original. See Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

And Judgment in Custody Suit, etc. — In accord with 6th paragraph in original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

A judgment awarding custody is based upon the conditions found to exist at the time it was entered. Owen v. Owen, 31 N.C. App. 230, 229 S.E.2d 49 (1976).

While a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require. Owen v. Owen, 31 N.C. App. 230, 229 S.E.2d 49 (1976).

Decree for Support Is Subject, etc. — The court is not warranted in ordering an increase of child support in the absence of findings of fact supported by competent evidence to show a substantial change of condition affecting the welfare of the children. Ebron v. Ebron, 40 N.C. App. 270, 252 S.E.2d 235 (1979).

Findings of Fact as to Past Expenditures on Children. — The court must make findings of specific facts as to what actual past expenditures have been to determine the amount of support necessary to meet the reasonable needs of the child for health, education, and maintenance. Ebron v. Ebron, 40 N.C. App. 270, 252 S.E.2d 235 (1979); Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

Imposition of Earnings Capacity Rule. — The court's conclusion underlying imposition of the earnings capacity rule must be based on evidence that tends to show the husband's actions resulting in the reduction of his income were not taken in "good faith." Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

A court may refuse to modify a support and/or alimony award on the grounds that the husband has failed to exercise his reasonable capacity to earn because of a disregard of his marital and parental obligations to provide reasonable support for his wife and minor child. Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

The determination that a husband's change in circumstances has been voluntarily effected by him in disregard of his marital and parental obligations justifying imposition of the earnings capacity rule is a conclusion of law based on the factual findings in the particular case. Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

Consideration of Needs of Father's Second Family. — In determining a father's ability to meet the required payments for the support of his children, some reasonable allowance must be made for his living expenses, and for the fact that he has a second family. However, the needs of children of his first marriage cannot be made subservient to the needs of his second family. Beasley v. Beasley, 37 N.C. App. 255, 245 S.E.2d 820 (1978), aff'd, 296 N.C. 580, 251 S.E.2d 433 (1979).

The wishes of a child. — In accord with original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123 (1979).

Although not controlling, the wishes of a child who has reached the age of discretion are entitled to consideration in awarding custody because the consideration of such wishes will aid the court in making a custodial decree which is for the best interests and welfare of the child. In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977).

When the child has reached the age of discretion, the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when it is of an age and capacity to form an intelligent or rational view on the matter. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

The expressed wish of a child of discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

The preference of the child should be based upon a considered and rational judgment, and not made because of some temporary dissatisfaction or passing whim or some present lure. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

A change in circumstances must be shown. — In accord with 5th paragraph in original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979).

An agreement by the parties that the court may change visitation privileges in a custody order without any showing of changed conditions does not relieve the court of its duty to determine whether changed circumstances affecting the welfare of the child justify a modification. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Before the court will modify a custody order, it must be shown that the circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified. Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980); Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980).

And Change Must Be Substantial. — In accord with 1st paragraph in original. See Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977); Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

The changed circumstances with which the courts are concerned are those which relate to child-oriented expenses. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

The modification of a custody decree must be supported by findings of fact. — In accord with original. See Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977); Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978); Ebron v. Ebron, 40 N.C. App. 270, 252 S.E.2d 235 (1979); Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979).

Findings for Change in Amount of Support Payments. — The court must make findings as to the relative abilities of the parties to provide support before the court can order a change in the amount of support payments. Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

Finding for Modification of Custody Order. — While the court must make findings of fact to support its order, the court is not required to make findings in addition to a finding that the moving party has failed to prove a change in circumstances sufficient to warrant modification of the custody order. Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

Burden of Showing, etc. —

In accord with 1st paragraph in original. See Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

In accord with 5th paragraph in original. See King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979); Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980); Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980).

The party moving for modification assumes the burden of proving a substantial change of circumstances affecting the welfare of the child. Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

The moving party has the burden of showing a substantial change of circumstances affecting the welfare of the child. Ebron v. Ebron, 40 N.C. App. 270, 252 S.E.2d 235 (1979).

The proper procedure to follow when a supported child reaches majority is to apply to the trial court for relief under this section. Tilley v. Tilley, 30 N.C. App. 581, 227 S.E.2d 640 (1976).

Custody Encompasses Visitation Rights. — Visitation privileges are but a lesser degree of custody. Thus, the word "custody" as used in this section was intended to encompass visitation rights as well as general custody. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

The trial court properly refused to consider the issue of visitation rights on plaintiff's motion to set aside a child custody order where such consideration would be a modification of the prior order's grant of exclusive custody to the defendant, since the court may modify custody or visitation only upon a showing of changed circumstances and on adequate motion in the cause, and plaintiff's motion was inadequate for this purpose. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Modification of Order Transferring Child Custody. — An order which transferred child custody from the plaintiff to the defendant was a final order under § 1A-1, Rule 60(b) even though the order could be changed subsequently upon a proper showing of change of circumstances under this section. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Standing of County in Modification Action. — Where plaintiff mother who receives public assistance under the Aid to Families with Dependent Children Program assigned to a county her right to receive any support on behalf of her children, the county, by virtue of the assignment pursuant to § 110-137, has an interest in the order for the support of plaintiff's children. Therefore, under subsection (a) of this section, the county has standing to make a motion in an action between plaintiff mother and defendant father to modify a child support order to require that the support be paid to the county. Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979).

Where a parent changes his residence, the effect on the welfare of the child must be shown in order for the court to modify a custody decree based on change of circumstances. Gordon v. Gordon, 46 N.C. App. 495, 265 S.E.2d 425 (1980).

Failure to State Findings on Issue of Visitation. — Where there is no finding by the trial court that ordered visitations are in the children's best interest, the case must be remanded for proper findings and conclusions on the issue. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Court's Findings of Fact Are Conclusive. —

In accord with 1st paragraph in original. See Daniels v. Hatcher, 46 N.C. App. 481, 265 S.E.2d 429 (1980).

In accord with 3rd paragraph in original. See Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979).

A finding by the district court that there has been no sufficient change of circumstances to justify modification of a custody order is conclusive and binding on the Court of Appeals if supported by competent evidence. Searl v. Searl, 34 N.C. App. 583, 239 S.E.2d 305 (1977).

Remarriage in and of itself is not a sufficient change of circumstance to justify modification of a child custody order. Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979).

Expenses to Which Defendant Voluntarily Obligated Himself. — It was error for the trial court to reduce the amount of child support payments required of defendant by one-third where defendant's showing of changed circumstances related almost exclusively to the additional expenses to which defendant had obligated himself, including sending a child who had reached majority to college, the expenses of a new home and family, and additional travel and telephone expense incident to visiting his children from out-of-state, and where defendant made no showing with respect to changed circumstances affecting the remaining minor children and made no showing that the expenses relating to one of the children's maintenance and support decreased by one-third when one of the children reached majority. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

The fact that defendant voluntarily has assumed the financial burden to send his eldest child to a high-tuition, out-of-state university does not justify the court in considering this factor in lowering child support payments. Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979).

Appellate Review. —

The scope of appellate review of a trial court's judgment awarding custody of children is well settled: The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence to the contrary, or even though some incompetent evidence may have been admitted. In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977).

Applied in Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Pritchard v. Pritchard, 45 N.C. App. 189, 262 S.E.2d 836 (1980).

Cited in Carmichael v. Carmichael, 40 N.C. App. 277, 252 S.E.2d 257 (1979); County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 50-13.8. Support of persons incapable of self-support upon reaching majority.

For the purposes of custody, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support. (1967, c. 1153, s. 2; 1971, c. 218, s. 3; 1973, c. 476, s. 133; 1979, c. 838, s. 29.)

Effect of Amendments. — The 1979 amendment deleted "and support" after "custody" near the beginning of the section, and deleted "provided that no parent may be held liable for the charges made by a facility owned or operated by the Department of Human Resources for the care, maintenance and treatment of such person who is a long-term patient" at the end of the section.

Session Laws 1979, c. 838, s. 122, contains a severability clause.

Legal Periodicals. — For survey of 1972 case law on child support and pre-Chapter 48A consent judgments, see 51 N.C.L. Rev. 1091 (1973).

§ 50-16.1. Definitions.

As used in the statutes relating to alimony and alimony pendente lite unless the context otherwise requires, the term:

(1) "Alimony" means payment for the support and maintenance of a spouse, either in lump sum or on a continuing basis, ordered in an action for divorce, whether absolute or from bed and board, or an action for alimony without divorce.

(2) "Alimony pendente lite" means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce.

(3) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(4) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support. (1967, c. 1152, s. 2; 1981, c. 274.)

Effect of Amendments. — The 1981 amendment deleted the former second sentence of subdivision (4), which read: "A husband is deemed to be the supporting spouse unless he is incapable of supporting his wife."

Legal Periodicals. — For article entitled "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

For note on separability of support and property provisions in ambiguous separation agreements, see 16 Wake Forest L. Rev. 152 (1980).

CASE NOTES

Subdivision (1) Contemplates "Permanent Alimony". — While the word "permanent" is not included in the definition of "alimony" in subdivision (1) of this section, the definition obviously contemplates what is commonly referred to as "permanent alimony." Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

A supporting spouse is by definition married to a dependent spouse. Therefore, a determination that one spouse is a supporting spouse is a determination that the other is a dependent spouse and vice versa. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

"Dependent Spouse". —

A wife is actually substantially dependent upon her husband for her maintenance and support or in substantial need of support by him if she is incapable of adequately providing for herself or is capable of adequately providing for herself but does not have a reasonable opportunity to do so. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

Where the trial court in an action for alimony pendente lite and permanent alimony found that the plaintiff wife had been gainfully employed prior to her marriage to the defendant and was "able-bodied, intelligent and capable to find employment," this finding was not sufficient to support the trial court's conclusion that the plaintiff was not a dependent spouse within the meaning of subdivision (3) of this section, as it did not include a finding that the plaintiff had a reasonable opportunity to but did not adequately support herself. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

The legislative intent in the use of the phrase "actually substantially dependent" in subdivision (4) is clear. This term implies that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation. Thus, to qualify as a "dependent spouse" under subdivision (3), one must be actually without means of providing for his or her accustomed standard of living. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

The trial court's conclusion that plaintiff-wife was the "dependent spouse" entitled to support was not supported by the findings of fact where the court found that defendant husband's income "is very significantly lower than same has been in the past" and also that "plaintiff is unable to continue to maintain her accustomed station in life"; there was no finding or evidence that defendant deliberately depressed his income in an effort to avoid his obligations; and it was apparent that the trial court disregarded defendant's own inability to maintain the station in life to which he was formerly accustomed in its determination of dependency. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

"Maintenance and Support" in Subdivision (3). — The term "accustomed standard of living of the parties" in § 50-16.5(a) completes the contemplated legislative meaning of "maintenance and support" in subdivision (3). The latter phrase clearly means more than a level of mere economic survival. Plainly it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

For a discussion of the legislative intent as to judicial determinations of dependency under subdivision (3) in light of § 50-16.5, see Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

Defendant was not entitled to a jury trial on the issue of supporting and dependent spouse status since issues of who is a dependent spouse and who is a supporting spouse are mixed questions of law and fact which can best be determined by the trial judge when he sets the amount of permanent alimony. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981).

Applied in Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977); Love v. Love, 41 N.C. App. 308, 254 S.E.2d 642 (1979); Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Quoted in Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979).

Stated in Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

Cited in Privette v. Privette, 30 N.C. App. 305, 227 S.E.2d 137 (1976); Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977); Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978); Davis v. Davis, 35 N.C. App. 111, 240 S.E.2d 488 (1978); Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978); Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Cavendish v. Cavendish, 38 N.C. App. 577, 248 S.E.2d 340 (1978); Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979); Southern v. Southern, 43 N.C. App. 159, 258 S.E.2d 422 (1979); Wilhelm v. Wilhelm, 43 N.C. App. 549, 259 S.E.2d 319 (1979); Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979).

§ 50-16.2. Grounds for alimony.

Legal Periodicals. — For article entitled "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For a note discussing the application of the compulsory counterclaim provision of § 1A-1, Rule 13 in divorce suits, see 57 N.C.L. Rev. 439 (1979).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Finding of Dependency Is Required. — The trial court erred in declaring invalid a consent judgment, which was adopted by the court and enforceable by contempt proceedings, because the consent judgment did not contain a finding that the payee-wife was a dependent spouse as required by former § 50-16. Cox v. Cox, 36 N.C. App. 573, 245 S.E.2d 94 (1978).

Protection for Nonsupporting Spouse. — The statutory policy behind the requirement of this section that only a "dependent spouse" is entitled to alimony is to protect a nonsupporting spouse from serious economic harm by making payments to the spouse who does not need support. Cox v. Cox, 36 N.C. App. 573, 245 S.E.2d 94 (1978).

Only a dependent spouse is entitled to alimony or alimony pendente lite. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

Evidence of Adultery. — Photographs showing the husband engaged in various acts of adultery were admissible only for the purpose of illustrating the testimony of a witness, and not as substantive evidence in an action for alimony alleging adultery as one of the grounds. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

Husband Cannot Be Compelled to Testify on Adultery. — A husband could not be compelled to testify in support of the admissibility of photographs showing him engaged in various acts of adultery in an action by the wife for alimony on the ground of adultery, since the action for alimony without divorce was a divorce action encompassed by the provisions of §§ 8-56 and 50-10 and a husband cannot be compelled to give testimony in support of his wife's allegation that he committed adultery. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

"Abandonment". —

In accord with 1st paragraph in original. See Murray v. Murray, 37 N.C. App. 406, 246 S.E.2d 52 (1978), aff'd, 296 N.C. 405, 250 S.E.2d 276 (1979); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979); Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980).

It has been held that one spouse abandons the other, within the meaning of this statute, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it. This definition establishes three distinct elements which must be proven by the dependent spouse to entitle her to alimony on the basis of abandonment. Murray v. Murray, 37 N.C. App. 406, 246 S.E.2d 52 (1978), aff'd, 296 N.C. 405, 250 S.E.2d 276 (1979).

Since there is no all-inclusive definition as to what will justify abandonment, each case must be determined in large measure upon its own circumstances. Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980).

Sexual cohabitation after acts of cruelty cannot be considered as condonation in the sense in which it would be after an act of adultery. The effort to endure unkind treatment as long as possible is commendable; and it is obviously a just rule that the patient endurance by one spouse of the continuing ill treatment of the other should never be allowed to weaken his or her right to relief under subdivision (7). Privette v. Privette, 30 N.C. App. 305, 227 S.E.2d 137 (1976).

The affirmative defense of condonation must be carried by the defendant. Privette v. Privette, 30 N.C. App. 305, 227 S.E.2d 137 (1976).

Proof of Husband's Earning Capacity. — In an action by a wife for relief in the form of alimony under subdivision (10) of this section, proof of the husband's earnings and his earning capacity was clearly relevant to a determination of "necessary subsistence according to his . . . means and conditions," and the trial court erred in ordering all such evidence to be excluded. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

Findings Which Support an Award, etc. —

In suits for alimony, the order granting alimony must contain one of the 10 grounds for alimony listed in this section as a conclusion of law. Findings of fact to support that conclusion must be made, and usually the finding or findings of fact necessary will involve the actions of the supporting spouse. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

Applied in Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979); Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Odom v. Odom, 47 N.C. App. 486, 267 S.E.2d 420 (1980); Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981).

Cited in Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Reid v. Reid, 29 N.C. App. 754, 225 S.E.2d 649 (1976); Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494 (1978); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978); Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

§ 50-16.3. Grounds for alimony pendente lite.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Purpose of Remedy. —

The purpose of the speedy proceedings for alimony pendente lite is to give the dependent spouse subsistence and counsel fees pending trial of the action on its merits. This result places the dependent spouse on a more nearly equal footing with the supporting spouse for purposes of preparing for and prosecuting the dependent spouse's claim. Black v. Black, 30 N.C. App. 403, 226 S.E.2d 858, appeal dismissed, 290 N.C. 775, 229 S.E.2d 31 (1976).

The purpose of alimony pendente lite is to provide the dependent spouse with reasonable living expenses during the pendency of litigation. Roberts v. Roberts, 30 N.C. App. 242, 226 S.E.2d 400 (1976).

The purpose of temporary alimony is to enable the dependent spouse to maintain herself according to her accustomed station in life pending the final determination of the issues. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

The purpose of alimony pendente lite is to provide for the reasonable support of the dependent spouse pending the final determination of her rights and not to establish a savings account for her. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

Prerequisites for Obtaining Alimony Pendente Lite. — In order to obtain alimony pendente lite, the applicant must be (1) a dependent spouse, (2) entitled to the relief demanded in the action, and (3) without sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. Ross v. Ross, 33 N.C. App.

447, 235 S.E.2d 405 (1977); Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

Subsistence and counsel fees pendente lite are within the discretion of the court. —

The specific amount of alimony pendente lite to be paid a dependent spouse is within the discretion of the trial judge to determine and will not be disturbed on appeal in the absence of an abuse of discretion. Strother v. Strother, 29 N.C. App. 223, 223 S.E.2d 838 (1976).

Discretion Is Not Absolute, etc. —

While the amount of alimony pendente lite to be awarded rests within the sound discretion of the trial judge, the judge must take into consideration a number of factors, including the accustomed standard of living of the parties and the estate of earnings of each party. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

The facts required by the statutes must be, etc. —

The facts required by this section must be alleged and proved before the order of alimony pendente lite is properly entered. Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

Findings of Fact Required. — In order for a spouse to be entitled to alimony pendente lite under this section, the trial court must make findings of fact to show three requirements: (1) the existence of a marital relationship; (2) the spouse is either (a) actually or substantially dependent upon the other spouse for maintenance and support, or (b) is substantially in need of maintenance and support from the other spouse; and (3) the supporting spouse is capable of making the required payments. Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Absent a finding of fact in the order of alimony pendente lite that the plaintiff was a dependent spouse, alimony pendente lite may not be awarded. Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

In suits for alimony pendente lite, the grounds listed under this section are conclusions of law necessary to justify an order granting such alimony. The court, therefore, must conclude as a matter of law that the party seeking alimony pendente lite (1) is the dependent spouse, (2) is a party in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce and, (3) from all the evidence presented pursuant to § 50-16.8(f), (a) is entitled to the relief demanded in the action, and (b) is shown to lack sufficient means whereon to subsist during the prosecution or defense of the suit. Specific facts which support such a conclusion must be found. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

This section requires the trial judge to conclude as a matter of law that the spouse seeking alimony pendente lite is the dependent spouse within the meaning of § 50-16.1(3); that such spouse is a party in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce; that such spouse is entitled to the relief demanded; and that such spouse is shown to lack sufficient means whereon to subsist during the course of the litigation. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

Setting Forth Findings of Fact. —

In accord with 1st paragraph in original. See Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

In accord with 3rd paragraph in original. See Ingle v. Ingle, 42 N.C. App. 365, 256 S.E.2d 532 (1979).

Due regard must also be given to the ability of the supporting spouse to pay. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

When Award Based on Capacity to Earn. —

An award of alimony pendente lite may not be based on the earning capacity of the supporting spouse in the absence of a finding that the defendant is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support. Gobble v. Gobble, 35 N.C. App. 765, 242 S.E.2d 516 (1978).

Only a dependent spouse is entitled to alimony or alimony pendente lite. Galloway v. Galloway, 40 N.C. App. 366, 253 S.E.2d 41 (1979).

Wife's Estate Insufficient, etc. —

The fact that the wife has separate property of her own does not relieve the husband of his duty to maintain for his wife the standard of living to which she has become accustomed. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

Consideration of Dependent Spouse's Station in Life. — In determining the need for maintenance and support, the court will give due consideration to plaintiff's accustomed station in life. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867 (1979).

The mere fact that the wife has property or means of her own does not prohibit an award of alimony pendente lite. Strother v. Strother, 29 N.C. App. 223, 223 S.E.2d 838 (1976); Robbins v. Robbins, 43 N.C. App. 488, 259 S.E.2d 353 (1979).

Nor a Determination of Property Rights. —

The final merits of the action are not before the trial judge upon a pendente lite hearing. Therefore, upon a pendente lite hearing, the trial judge may not determine the ultimate property rights of the parties. Black v. Black, 30 N.C. App. 403, 226 S.E.2d 858, appeal dismissed, 290 N.C. 775, 229 S.E.2d 31 (1976).

A determination of the rights to a joint savings account is a matter for final hearing on all the merits, and not for hearing on alimony pendente lite. Roberts v. Roberts, 30 N.C. App. 242, 226 S.E.2d 400 (1976).

Findings of Fact Necessary for Award of Attorney Fees. — In order to award attorney fees in alimony cases the trial court must make findings of fact showing that fees are allowable and that the amount awarded is reasonable. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

The clear and unambiguous language of this section and § 50-16.4 require that to receive attorney's fees in an alimony case it must be determined that (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. All three of these determinations must be made in order to support an award of attorney fees. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

Counsel fees are not allowable in all alimony cases, only those that come within the ambit of this section and § 50-16.4. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Prerequisite to Award of Attorney Fees. — Before attorney's fees may be awarded in an alimony case to the dependent spouse under this section and § 50-16.4 and before attorney's fees may be awarded to the interested party in a custody, support, or custody and support suit under § 50-13.6, that person must have insufficient means to defray the expense of the suit; that is, as interpreted by cases of the Supreme Court of this State, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Reviewable Question of Law in Award of Attorney Fees. — The facts required by this section and § 50-16.4 must be alleged and proved to support an order for attorney's fees. Whether these requirements have been met is a question of law that is reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Amount of Attorney Fees within Court's Discretion. — If attorney's fees may be properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Weight of Evidence is for Trier of Facts. — While the sufficiency of the findings of fact to support the award is reviewable on appeal, the weight to be accorded the evidence is solely for the trier of the facts. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

Findings Conclusive on Appeal. — If the findings of fact are supported by competent evidence, they are conclusive on appeal even though the evidence would support contrary findings. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

Effect of Reconciliation, etc. —

An order requiring defendant to pay alimony pendente lite to plaintiff was voided when the parties subsequently resumed the marital relationship. O'Hara v. O'Hara, 46 N.C. App. 819, 266 S.E.2d 59 (1980).

Specific Performance of Alimony Provisions of Separation Agreement. — The trial court had authority under § 1A-1, Rule 65 to grant specific performance of the alimony provisions of a separation agreement in order to preserve the status quo pending final determination of the merits of an action on the agreement. Gibson v. Gibson, 49 N.C. App. 156, 270 S.E.2d 600 (1980).

Effect of Appeal. — When an order arising from a domestic case is appealed, the cause is taken out of the jurisdiction of the trial court and put into the jurisdiction of the appellate court. Pending the appeal, the trial judge is functus officio and is without authority to act in the matter. Traywick v. Traywick, 31 N.C. App. 363, 229 S.E.2d 220 (1976).

The district court had jurisdiction to entertain a motion in the cause and to adjudge defendant guilty of contempt for failure to comply with the alimony pendente lite order after the judgment on the merits had been reversed on other grounds, a new trial was ordered and the case was certified back to the trial court by the Court of Appeals. Traywick v. Traywick, 31 N.C. App. 363, 229 S.E.2d 220 (1976).

Applied in Davis v. Davis, 35 N.C. App. 111, 240 S.E.2d 488 (1978); Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980).

Quoted in Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976).

Cited in Wilhelm v. Wilhelm, 43 N.C. App. 549, 259 S.E.2d 319 (1979).

§ 50-16.4. Counsel fees in actions for alimony.

CASE NOTES

The purpose of the allowance, etc. — The purpose of the allowance of attorney's fees in an alimony case is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Elements to Be Considered. — At any time a dependent spouse can show that she has the grounds for alimony pendente lite — (1) that she is entitled to the relief demanded in her action or cross-action for divorce from bed and board or alimony without divorce, and (2) that she does not have sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof — the court is authorized to award fees to her counsel. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Before attorney's fees may be awarded in an alimony case to the dependent spouse under this section and § 50-16.3 and before attorney's fees may be awarded to the interested party in a custody, support, or custody and support suit under § 50-13.6, that person must have insufficient means to defray the expense of the suit; that is, as interpreted by cases of the Supreme Court of this State, he or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

The clear and unambiguous language of § 50-16.3 and this section require that to receive attorney's fees in an alimony case it must be determined that (1) the spouse is entitled to the relief demanded; (2) the spouse is a dependent spouse; and (3) the dependent spouse has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. All three of these determinations must be made in order to support an award of attorney fees. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

"At any time" includes times subsequent to determination of the issues in favor of the dependent spouse at the trial of her cause on its merits. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Counsel fees are not allowable in all alimony cases, only those that come within the ambit of this section and § 50-16.3. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Findings of Fact Must Support Award. — In order to award attorney fees in alimony cases the trial court must make findings of fact showing that fees are allowable and that the amount awarded is reasonable. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

The trial court must set out the findings of fact upon which the award of attorney fees is made. Self v. Self, 37 N.C. App. 199, 245 S.E.2d 541, cert. denied, 295 N.C 648, 248 S.E.2d 253 (1978).

And Absence of Sufficient Findings, etc. — An award of attorney's fees cannot be upheld where the court failed to make findings of fact upon which a determination of the reasonableness of the fees can be based, such as the nature and scope of the legal services rendered, and the skill and time required. Brown v. Brown, 47 N.C. App. 323, 267 S.E.2d 345 (1980).

The court erred in awarding counsel fees to the wife in a child support action where the court made no findings as to the wife's ability to pay or the reasonableness of the fees. Horner v. Horner, 47 N.C. App. 334, 267 S.E.2d 65, cert. denied, 301 N.C. 89, 273 S.E.2d 297 (1980).

Section Not Restricted to Alimony Pendente Lite Proceedings. — While the language of this section could be improved upon, its effect is not to restrict the award of counsel fees to alimony pendente lite proceedings and actions of the court pursuant thereto. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

Recovery of Fees after Denial of Alimony Pendente Lite. — There was no merit to defendant's contention that, because plaintiff's claim for alimony pendente lite was denied, plaintiff was precluded from recovering attorney's fees in the subsequent action for permanent alimony. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981).

Award of "Expenses" Not Authorized. — This section provides only for the award of "reasonable counsel fees," making no mention of "expenses." Williams v. Williams, 42 N.C. App. 163, 256 S.E.2d 401 (1979), aff'd, 299 N.C. 174, 261 S.E.2d 849 (1980).

Reviewable Question of Law. — The facts required by this section and § 50-16.3 must be alleged and proved to support an order for attorney's fees. Whether these requirements have been met is a question of law that is reviewable on appeal. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Amount of Award within Discretion of Court. — If attorney's fees may be properly awarded, the amount of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion. Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980).

Applied in Hampton v. Hampton, 29 N.C. App. 342, 224 S.E.2d 197 (1976); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

Stated in Blair v. Blair, 44 N.C. App. 605, 261 S.E.2d 301 (1980).

§ 50-16.5. Determination of amount of alimony.

Legal Periodicals. — For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

CASE NOTES

Discretion of Judge. —

In accord with 3rd paragraph in original. See Ingle v. Ingle, 42 N.C. App. 365, 256 S.E.2d 532 (1979); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979).

In accord with 4th paragraph in original. See Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659, aff'd in part and rev'd in part, 301 N.C. 123, 271 S.E.2d 58 (1980).

In accord with 13th paragraph in original. See Ingle v. Ingle, 42 N.C. App. 365, 256 S.E.2d 532 (1979).

In determining the amount of alimony and child support to be awarded, the trial judge must follow the requirements of this section. The amount is a reasonable subsistence, to be determined by the trial judge in the exercise of a judicial discretion from the evidence before him. His determination is reviewable, but it will not be disturbed in the absence of a clear abuse of discretion. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

The amount of alimony allowed is a matter within the discretion of the trial judge and his decision will not be disturbed absent a showing of abuse of discretion. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

The amount of alimony to be awarded lies in the sound discretion of the trial judge. In the absence of abuse of that discretion, the award will not be disturbed. The same should be true for reduced alimony. Self v. Self, 37 N.C. App. 199, 245 S.E.2d 541, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978).

Subsection (b) of this section makes it clear that the trial court may, in its discretion, award some permanent alimony to a dependent spouse even when the jury finds that the dependent spouse has committed acts which would support the granting of a divorce from bed and board in favor of the supporting spouse. Cavendish v. Cavendish, 38 N.C. App. 577, 248 S.E.2d 340 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 33 (1979).

The amount to be awarded is a question of fairness to the parties, and, so long as the court has properly taken into consideration the factors enumerated by statute, the award will not be disturbed absent an abuse of discretion. Gardner v. Gardner, 40 N.C. App. 334, 252 S.E.2d 867, cert. denied, 297 N.C. 299, 254 S.E.2d 917 (1979); Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

While the factors which are delineated in this section must be considered by the judge in determining the amount of alimony to be awarded in a given case, his determination of the proper amount may not be disturbed on appeal absent a clear showing of abuse of discretion. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980); Payne v. Payne, 49 N.C. App. 132, 270 S.E.2d 546 (1980).

When Discretion Properly Applied. — Discretion is properly applied in those instances where, upon deliberation and with firmness, a judge deems its use necessary to the proper execution of justice. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

For a discussion of the legislative intent as to judicial determinations of dependency under § 50-16.1(3) in light of this section, see Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

Meaning of "Maintenance and Support" in Light of Section. — The term "accustomed standard of living of the parties" in subsection

(a) of this section completes the contemplated legislative meaning of "maintenance and support" in § 50-16.1(3). The latter phrase clearly means more than a level of mere economic survival. Plainly it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

In determining the needs of a dependent spouse, etc. —

While the amount of alimony pendente lite to be awarded rests within the sound discretion of the trial judge, the judge must take into consideration a number of factors, including the accustomed standard of living of the parties and the estate of earnings of each party. Cornelison v. Cornelison, 47 N.C. App. 91, 266 S.E.2d 707 (1980).

When Award Based on Defendant's Earnings, etc. —

Ordinarily the husband's ability to pay is determined by his income at the time the award is made if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

One who has no income, but is able-bodied and capable of earning, etc. —

Capacity to earn may be the basis of an award if it is based upon a proper finding that the husband is deliberately depressing his income or indulging himself in excessive spending because of a disregard of his marital obligation to provide reasonable support for his wife and children. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976).

The court must consider the estate and earnings of both husband and wife. —

In fixing the amount of alimony and child support which the husband is required to pay the wife, the court must consider not only the needs of the wife and children but the estate and earnings of both the husband and wife. It is a question of fairness and justice to all parties. Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978).

Where plaintiff-husband has substantial income as compared to the limited income of the defendant-wife, the court is required by subsection (a) of this section to award the wife such alimony as will allow her to live as the wife of a man of plaintiff's income is entitled to live. McLeod v. McLeod, 43 N.C. App. 66, 258 S.E.2d 75, cert. denied, 298 N.C. 807, 261 S.E.2d 920 (1979).

Income Tax Consequences of Award as Factor to Be Considered. — While it is true that the express language of subsection (a) of this section does not include the income tax consequences of an award of alimony as a factor to be weighed in the balance in determining the proper amount of the award, such would be a proper consideration in making that determination. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

The issues of who is a dependent spouse and who is a supporting spouse present mixed questions of law and fact which can best be determined by the trial judge when he sets the amount of permanent alimony. Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

Finding That All Items in Defendant's Budget Were Not Necessary. — The trial court's finding in an alimony action that all of the items in a budget submitted by defendant wife were not "needed or necessary" items did not show that the court applied an improper standard in determining the amount of alimony for the wife of a wealthy man, since it was clear that the court considered what expenses were necessary to maintain the standard of living of a woman who was married to a man of substantial means rather than what was necessary to maintain bare subsistence. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Conclusion Not Supported by Findings. — The trial court's conclusion that plaintiff-wife was the "dependent spouse" entitled to support was not supported by the findings of fact where the court found that defendant husband's income "is very significantly lower than same has been in the past" and also that "plaintiff is unable to continue to maintain her accustomed station in life"; there was no finding or evidence that defendant deliberately depressed his income in an effort to avoid his obligations; and it was apparent that the trial court disregarded defendant's own inability to maintain the station in life to which he was formerly accustomed in its determination of dependency. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

Issue of Wife's Conduct. — The legislature has seen fit to leave the question of whether indignities committed by a wife prior to separation should absolutely bar her right to alimony arising out of her husband's adultery, or merely reduce the amount, for resolution by the trial judge in the exercise of his discretion on a case by case basis. Self v. Self, 37 N.C. App. 199, 245 S.E.2d 541, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978).

Finding on Dependent Spouse's Earning Capacity Not Always Required. — This section specifies the earning capacity of the parties as one of the factors the court should consider in determining the amount of alimony, but the court is not required in all cases to make findings of fact on the question of the dependent spouse's earning capacity. Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977), cert. denied, 294 N.C. 363, 242 S.E.2d 634 (1978).

Findings of Fact. — In the case of both alimony and alimony pendente lite, the order concerning amount must be supported by a conclusion of law that such amount is necessary under the circumstances. This conclusion of law, in turn, must be supported by specific findings of fact as to the estates, earnings, earning capacity, condition, and accustomed standard of living of the parties, as well as other relevant factors. Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978).

Reduction of Alimony. — Where reduced alimony is appropriate the court need not set out the amount of the reduction in its judgment. Self v. Self, 37 N.C. App. 199, 245 S.E.2d 541, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978).

Applied in Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979); Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981).

Cited in Blair v. Blair, 44 N.C. 605, 261 S.E.2d 301 (1980).

§ 50-16.6. When alimony not payable.

Legal Periodicals. — For article entitled "Proposed Reforms in North Carolina Divorce Law," see 8 N.C. Cent. L.J. 35 (1976).

For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

CASE NOTES

Effect of Post-Divorce Sexual Activity. — This section is not an expression of legislative intent that post-divorce indiscriminate sexual activity by a former wife should bar her right to continue to receive alimony from her former husband. Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978).

There is no statute that allows the court to modify an award of alimony solely because of post-marital fornication. Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978).

Applied in Levitch v. Levitch, 294 N.C. 437, 241 S.E.2d 506 (1978).

Cited in Sturgill v. Sturgill, 49 N.C. App. 578, 272 S.E.2d 423 (1980).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

(j) An order for the payment of alimony or alimony pendente lite is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes.

(1977, c. 711, s. 26.)

Effect of Amendments. — The 1977 amendment, effective July 1, 1978, rewrote subsection (j).

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (j) is set out.

Legal Periodicals. — For note on the remedy of garnishment in child support, see 56 N.C.L. Rev. 169 (1978).

For a note on equitable distribution of property upon divorce, see 11 N.C. Cent. L.J. 156 (1980).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

CASE NOTES

Limit of Court's Authority. —

The court has no power to order a lump sum payment either to punish the supporting spouse or to divide his estate. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

The trial court had no power to order defendant husband to make a lump sum payment of $50,000.00 to plaintiff wife where it was apparent that the effect of the court's order would be to force defendant to liquidate, either by sale or mortgage, his only remaining assets having any substantial value, not for the purpose of paying for the maintenance and support of defendant, but in order to effect a division of his estate with her. Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980).

Court Need Not Order Transfer of Property. —

While the court has authority to order a transfer of title or possession of real property under subsection (a) of this section and § 50-17, these sections do not require it to do so. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659, aff'd, 301 N.C. 123, 271 S.E.2d 58 (1980).

While a trial court has the authority to order payment of alimony by possession of real property under subsection (a) of this section, as well as the power to issue a writ of possession when necessary under § 50-17, the pertinent statutory provisions do not require it to do so. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Power to Transfer Personalty Dependent on Alimony Power. — Although subsection (a) of this section clearly vests the court with power to order a transfer of personalty, that power does not exist independently of the court's power to order alimony for the dependent spouse. This section contemplates such transfers only in terms of satisfaction of the obligation to support. Where the court was not ordering a transfer of property as payment of alimony, the statute is, therefore, inapplicable. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659, aff'd, 301 N.C. 123, 271 S.E.2d 58 (1980).

Consent Judgment Valid and Enforceable. —

Where the consent judgment ordered that the plaintiff pay alimony in a certain amount per month and that if either party willfully failed to comply with and perform the terms and conditions of the separation agreement, the court could hold the breaching party in contempt of court, and the divorce decree ordered that the consent judgment dated should remain in effect according to the respective terms and conditions and applicable law, the judgment was actually an adjudication by the court which was enforceable by contempt and subject to modification upon a change of conditions rather than a contract approved by the court which could not be modified absent a consent of the parties. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

Amount Due under Prior Orders, etc. —

When the obligor under a judgment awarding alimony and child support is in arrears in the periodic payment of the alimony and child support the court may, upon motion in the cause, judicially determine the amount then properly due and enter its final judgment for the total then properly due, and execution may issue thereon. Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Unless Decree Constitutes Lien, Arrears Must Be Reduced to Judgment before Execution. — A decree for periodic payments of alimony and support, in the absence of a provision in the decree itself which constitutes it a specific lien upon the property of the obligor, is not enforceable by execution until the arrears are reduced to judgment by a judicial determination of the amount then due. This is so because the decree for alimony and support may be modified as circumstances may justify. Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Where a pendente lite order by its express language was effective only "pending the trial of this action," it was in all respects superseded by the rendition of the final judgment. Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

Garnishment of Wages. — Garnishment of defendant's wages for payment of alimony was not improper since defendant's future earnings were not garnished and since defendant was not entitled to a 60-day exemption because he could not show that his earnings were necessary for the use of a family supported wholly or partly by his labor. Sturgill v. Sturgill, 49 N.C. App. 578, 272 S.E.2d 423 (1980).

Applied in Love v. Love, 41 N.C. App. 308, 254 S.E.2d 642 (1979); Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980).

Quoted in Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976).

Stated in Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981).

Cited in Conrad v. Conrad, 35 N.C. App. 114, 239 S.E.2d 862 (1978).

§ 50-16.8. Procedure in actions for alimony and alimony pendente lite.

(a) The procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section and in G.S. 50-19.

(1979, c. 709, s. 4.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added "and in G.S. 50-19" at the end of subsection (a).

Only Part of Section Set Out. — As the rest of the section was not changed by the amendment, only subsection (a) is set out.

CASE NOTES

I. IN GENERAL.

No Conflict with Rule 13(a). — There is no conflict between the statutes dealing with procedure in divorce actions and § 1A-1, Rule 13(a). Rather Rule 13(a) superimposes an additional characteristic on certain kinds of counterclaims. Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

The statutes dealing specifically with divorce actions do not prescribe a procedure for counterclaims different from that prescribed in § 1A-1, Rule 13(a). Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978).

Validity of Consent Judgment. — The trial court erred in declaring invalid a consent judgment, which was adopted by the court and enforceable by contempt proceedings, because the consent judgment did not contain a finding that the payee-wife was a dependent spouse as required by former § 50-16. Cox v. Cox, 36 N.C. App. 573, 245 S.E.2d 94 (1978).

Applied in Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976).

Cited in Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976); Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977); Davis v. Davis, 35 N.C. App. 111, 240 S.E.2d 488 (1978); Steele v. Steele, 36 N.C. App. 601, 244 S.E.2d 466 (1978); Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978); Benson v. Benson, 39 N.C. App. 254, 249 S.E.2d 877 (1978).

II. ALIMONY PENDENTE LITE AND COUNSEL FEES.

When Notice Dispensed with. —

Where the supporting spouse abandons the dependent spouse and leaves the state, notice of hearing on motion for alimony pendente lite is not required nor is service on the supporting spouse's counsel of record required. Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979), cert. denied and appeal dismissed, 446 U.S. 930, 100 S. Ct. 2144, 64 L. Ed. 2d 783 (1980).

Determining Proper Amount of Counsel Fees. — The trial court is under an obligation to conduct a broad inquiry in making its determination of the proper amount of counsel fees which are to be awarded a dependent spouse as litigant, considering as relevant factors the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and reasonable consideration for the parties' respective conditions and financial circumstances. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

It would be contrary to what the court perceives to be the intent of the legislature to require a dependent spouse to meet the expenses of litigation through the unreasonable depletion of her separate estate where her separate estate is considerably smaller than that of the supporting spouse. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Award of permanent alimony ordinarily terminates, etc. —

In accord with original. See Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

Where a pendente lite order by its express language was effective only "pending the trial of this action," it was in all respects superseded by the rendition of the final judgment. Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

§ 50-16.9. Modification of order.

Cross References. — As to distribution by court of marital property upon divorce, see § 50-20.

Legal Periodicals. — For note on reinstatement of alimony under a prior divorce decree after annulment of remarriage, see 14 Wake Forest L. Rev. 273 (1978).

For a survey of 1977 law on domestic

relations, see 56 N.C.L. Rev. 1045 (1978).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For note on specific performance of separation agreements, see 58 N.C. L. Rev. 867 (1980).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For note on separability of support and property provisions in ambiguous separation agreements, see 16 Wake Forest L. Rev. 152 (1980).

CASE NOTES

But May Be Modified or Vacated, etc. — Under subsection (a), the spouse may obtain a modification of the order for permanent alimony upon a showing of changed circumstances, even though the order was by consent. Seaborn v. Seaborn, 32 N.C. App. 556, 233 S.E.2d 67 (1977); Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d 389 (1979).

New Order for Alimony Not Authorized. — Although an order granting alimony may be modified, when a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter a new order for alimony. Baugh v. Baugh, 44 N.C. App. 50, 260 S.E.2d 161 (1979).

A change in circumstances must be shown. —

The "changed circumstances" under this section must bear upon the financial needs of the dependent spouse or the ability of the supporting spouse to pay. The term has no relevance to the post-marital conduct of either party. Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978); Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

A court may vacate or modify its prior award of either permanent or temporary alimony upon a showing of changed circumstances. Roberts v. Roberts, 38 N.C. App. 295, 248 S.E.2d 85 (1978).

Change Must Be Substantial. — Not any change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a substantial change in conditions, upon which the moving party bears the burden of proving that the present award is either inadequate or unduly burdensome. Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

Determining Whether Substantial Change Occurred. — The present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change. Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

A conclusion as a matter of law that changed circumstances exist, based only on the parties' incomes, is erroneous and must be reversed. Britt v. Britt, 49 N.C. App. 463, 271 S.E.2d 921 (1980).

Changed circumstances do not have to be pled with specificity. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

Sufficiency of Allegations. — Allegations in a motion for modification to the effect that the then-current alimony payments were inadequate were sufficient to withstand defendant's motion to dismiss. Specific allegations as to the basis of such inadequacy were not required. White v. White, 37 N.C. App. 471, 246 S.E.2d 591 (1978), aff'd, 296 N.C. 661, 252 S.E.2d 698 (1979).

Plaintiff's allegation in a motion for increased support that the payments she is receiving are totally inadequate under current circumstances is sufficient to withstand a motion to dismiss under Rule 12(b)(6). White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

Adoption of Consent Agreement. — Where a court adopts the agreement of the parties as its own determination of the rights of the parties and orders the husband to pay alimony, the consent judgment is a decree of the court and is modifiable and enforceable by contempt. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

Modification of Consent Judgment. —

For a court to have power to modify a consent judgment, the judgment must be an order of the court, and the order must be one to pay alimony. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

An agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

Where the consent judgment ordered that the plaintiff pay alimony in a certain amount per month and that if either party willfully failed to comply with and perform the terms and conditions of the separation agreement, the court could hold the breaching party in contempt of court, and the divorce decree ordered that the consent judgment dated should remain in effect according to the respective terms and conditions and applicable law, the judgment was actually an adjudication by the court which was enforceable by contempt and subject to modification upon a change of conditions rather than a contract approved by the court which could not be modified absent a consent of the parties. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

A judgment which purports to be a complete settlement of all property and marital rights between the parties and which does not award alimony within the accepted definition of that term is not subject to modification even though it adjudges that the wife recover a specific money judgment. This is a consent judgment in its technical sense. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

If the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

An agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. Britt v. Britt, 36 N.C. App. 705, 245 S.E.2d 381 (1978).

In North Carolina (1) an agreement for division of property rights, and (2) an order for the payment of alimony, within the accepted definition of that term, may be included as separable provisions in a consent judgment. In such a case, the alimony provision is subject to modification where it has been ordered by the district court. However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. White v. White, 37 N.C. App. 471, 246 S.E.2d 591 (1978), aff'd, 296 N.C. 661, 252 S.E.2d 698 (1979).

Recitals in a consent judgment and the judgment of divorce to the effect that all matters in controversy arising from the pleadings had been agreed upon were not determinable upon the question as to whether the support provision of the consent decree was separable, and therefore modifiable or instead constituted consideration for a property settlement. White v. White, 37 N.C. App. 471, 346 S.E.2d 591 (1978), aff'd, 296 N.C. 661, 252 S.E.2d 698 (1979).

Whether a decree or award made pursuant to an agreement or arrangement between the parties is subject to modification may depend upon whether it is in effect an award of alimony or support or an adjustment and settlement of property rights. White v. White, 37 N.C. App. 471, 246 S.E.2d 591 (1978), aff'd, 296 N.C. 661, 252 S.E.2d 698 (1979).

While an agreement for the division of property rights and an order for the payment of alimony may be included as separate provisions in a consent judgment, that both provisions are included in the judgment is, standing alone, inconclusive of the issue of separability. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

In cases in which the question of whether provisions in a consent judgment or separation agreement are separable is not adequately addressed in the document itself, there is a presumption that provisions in a separation agreement or consent judgment made a part of the court's order are separable and that provisions for support payments therein are subject to modification upon an appropriate showing of changed circumstances. The effect of this presumption is to place the burden of proof on the issue of separability on the party opposing modification. The policies underlying the presumption require that this burden be discharged only by a preponderance of the evidence. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

For a court to have power to modify a consent judgment, the first requirement of this section, as with case law, is that the judgment consented to be an order of a court. The second essential requirement is that the order be one to pay alimony. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

Refusal to Hear Evidence for Modification Held Error. — In an action to recover past due alimony payments under a foreign judgment the trial judge erred in refusing to hear evidence offered by the defendant of changed circumstances as it related to possible modification of future payments. Thompson v. Thompson, 34 N.C. App. 51, 237 S.E.2d 282 (1977).

Transforming Contempt Hearing to Modification Hearing. — The court, on its own motion and without notice to plaintiff, cannot transform a hearing for defendant to show cause why he should not be held in contempt for willful failure to comply with a court order to pay alimony and support into a hearing for modification of such order. Conrad v. Conrad, 35 N.C. App. 114, 239 S.E.2d 862 (1978).

Periodic Support Payments as Consideration for Property Division. — Even though denominated as such, periodic support payments to a dependent spouse may not be alimony within the meaning of this section and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

Even though denominated as "alimony," periodic support payments to a dependent spouse may not be alimony within the meaning of this section if the provisions for the property divisions between the parties constitute reciprocal consideration for each other. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

Effect of Post-Marital Fornication. — There is no statute that allows the court to modify an award of alimony solely because of post-marital fornication. Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494, cert. denied, 295 N.C. 648, 248 S.E.2d 249 (1978).

Imposition of Earnings Capacity Rule. — The court's conclusion underlying imposition of the earnings capacity rule must be based on evidence that tends to show the husband's actions resulting in the reduction of his income were not taken in "good faith." Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

Failure to Exercise Capacity to Earn. — A court may refuse to modify a support and/or alimony award on the grounds that the husband has failed to exercise his reasonable capacity to earn because of a disregard of his marital and parental obligations to provide reasonable support for his wife and minor child. Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

The determination that a husband's change in circumstances has been voluntarily effected by him in disregard of his marital and parental obligations justifying imposition of the earnings capacity rule is a conclusion of law based on the factual findings in the particular case. Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

Power of Alabama Court to Modify Alimony Decree. — An Alabama court which had in personam jurisdiction over the parties could modify a North Carolina alimony decree, where the Alabama court in effect found that circumstances had changed since the entry of the North Carolina decree. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

An Alabama court with in personam jurisdiction over the parties could not modify retroactively a North Carolina alimony judgment where there was no showing of any sudden emergency requiring such a reduction. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

Where an Alabama court which had in personam jurisdiction over the parties modified a North Carolina alimony decree, the dependent spouse's right to alimony was terminated as of the entry of the Alabama decree. There was no need to prolong the litigation by requiring the supporting spouse to commence a third proceeding in North Carolina to set aside the prior North Carolina judgment. Vincent v. Vincent, 38 N.C. App. 580, 248 S.E.2d 410 (1978).

Trial court's suspension of support payments without proper motion by defendant and without notice in a hearing for defendant to show cause why he should not be held in contempt for failure to pay support deprives plaintiff of her property rights without due process as required by the Fourteenth Amendment to the United States Constitution and N.C. Const., Art. I, § 19. Conrad v. Conrad, 35 N.C. App. 114, 239 S.E.2d 862 (1978).

Seeking Relief as to Future Payments under Foreign Alimony Decree. — There is no impediment to a defendant's seeking relief as to future alimony payments in an action by a plaintiff for recovery of payments accrued under a foreign alimony decree. However, it is advisable that he should do so by counterclaim specifically alleging a change of circumstances and specifically seeking relief only as to future payments. Thompson v. Thompson, 34 N.C. App. 51, 237 S.E.2d 282 (1977).

Applied in Downey v. Downey, 29 N.C. App. 375, 224 S.E.2d 255 (1976); Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Quoted in Cox v. Cox, 36 N.C. App. 573, 245 S.E.2d 94 (1978).

Cited in Bugher v. Bugher, 34 N.C. App. 601, 239 S.E.2d 303 (1977); Russ v. Russ, 43 N.C. App. 74, 257 S.E.2d 676 (1979).

§ 50-17. Alimony in real estate, writ of possession issued.

CASE NOTES

Transfer Not Required. — While the court has authority to order a transfer of title or possession of real property under § 50-16.7(a) and this section, these sections do not require it to do so. Clark v. Clark, 44 N.C. App. 649, 262 S.E.2d 659 (1980).

Award of Homeplace as Part of Support. — The award of the homeplace does not constitute a writ of possession within the meaning of this section and the trial judge may award exclusive possession of the homeplace, even though owned by the entirety, as a part of support under § 50-13.4. Arnold v. Arnold, 30 N.C. App. 683, 228 S.E.2d 48 (1976).

The court has the power to grant the possession of real estate as a part of alimony.

Upchurch v. Upchurch, 34 N.C. App. 658, 239 S.E.2d 701 (1977).

Ordering Payment of Alimony by Possession of Real Property Not Required. — While a trial court has the authority to order payment of alimony by possession of real property under § 50-16.7(a), as well as the power to issue a writ of possession when necessary under this section, the pertinent statutory provisions do not require it to do so. Clark v. Clark, 301 N.C. 123, 271 S.E.2d 58 (1980).

§ 50-19. Maintenance of certain actions as independent actions permissible.

(a) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action for divorce under the provisions of G.S. 50-5 or G.S. 50-6 that is filed as an independent, separate action may be prosecuted during the pendency of an action for:

(1) Alimony;
(2) Alimony pendente lite;
(3) Custody and support of minor children;
(4) Custody and support of a person incapable of self-support upon reaching majority; or
(5) Divorce pursuant to G.S. 50-5 or G.S. 50-6.

(b) Notwithstanding the provisions of G.S. 1A-1, Rule 13(a), any action described in subdivision (a)(1) through (a)(5) of this section that is filed as an independent, separate action may be prosecuted during the pendency of an action for divorce under G.S. 50-5 or G.S. 50-6.

(c) Notwithstanding the provisions of this section, any divorce obtained under G.S. 50-5 or G.S. 50-6 by a supporting spouse shall not affect the rights of a dependent spouse with respect to any action for alimony or alimony pendente lite that is pending at the time the judgment for divorce is granted. (1979, c. 709, s. 2.)

Editor's Note. — Session Laws 1979, c. 709, s. 5, makes this section effective July 1, 1979.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Effect on Legal Consequences of Prior Supreme Court Decision. — The enactment of this section, providing that an action for divorce could be maintained during the pendency of an action for alimony notwithstanding the provisions of § 1A-1, Rule 13(a), did not apply to affect the legal consequences of a prior Supreme Court decision. Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

§ 50-20. Distribution by court of marital property upon divorce.

(a) Upon application of a party, the court shall determine what is the marital property and shall provide for an equitable distribution of the marital property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

(1) "Marital property" means all real and personal property acquired by either spouse during the course of the marriage and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section.

(2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention

is stated in the conveyance. Property acquired in exchange for separate property shall be considered separate property regardless of whether the title is in the name of the husband or wife or both. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. Vested pension or retirement rights and the expectation of nonvested pension or retirement rights shall be considered separate property.

(3) "Distributive award" means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include payments that are treated as ordinary income to the recipient under the Internal Revenue Code.

(c) There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:

(1) The income, property, and liabilities of each party at the time the division of property is to become effective;
(2) Any obligation for support arising out of a prior marriage;
(3) The duration of the marriage and the age and physical and mental health of both parties;
(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
(5) Vested pension or retirement rights and the expectation of nonvested pension or retirement rights, which are separate property;
(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
(9) The liquid or nonliquid character of all marital property;
(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;
(11) The tax consequences to each party; and
(12) Any other factor which the court finds to be just and proper.

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

(e) In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

(f) The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(g) If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(h) If either party claims that any real property is marital property, that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient provided the court finds that the claim of the spouse against property subject to the notice of lis pendens can be satisfied by money damages.

(i) Upon filing an action or motion in the cause requesting an equitable distribution, a party may seek an injunction pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37.

(j) In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided.

(k) The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action. (1981, c. 815, s. 1.)

Editor's Note. — Session Laws 1981, c. 815, s. 7, provides: "This act shall become effective October 1, 1981, and shall apply only when the action for an absolute divorce is filed on or after that date."

§ 50-21. Procedures in actions for equitable distribution of property.

Upon application of a party to an action for divorce, an equitable distribution of property shall follow a decree of absolute divorce. A party may file a cross action for equitable distribution in a suit for an absolute divorce, or may file a separate action instituted for the purpose of securing an order of equitable distribution, or may file an action or motion in the cause as provided in G.S. 50-11(e) and (f). Nothing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina. The equitable distribution may not precede a decree of absolute divorce. Real or personal property located outside of North Carolina is subject to equitable distribution in accordance with the provisions of G.S. 50-20 and the court may include in its order appropriate provisions to insure compliance with the order of equitable distribution. (1981, c. 815, s. 6.)

Editor's Note. — Session Laws 1981, c. 815, s. 7, provides: "This act shall become effective October 1, 1981, and shall apply only when the action for an absolute divorce is filed on or after that date."

Chapter 50A.

Uniform Child Custody Jurisdiction Act.

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§ 50A-1. Purposes of Chapter; construction of provisions.

(a) The general purposes of this Chapter are to:

(1) Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) Assure that litigation concerning the custody of a child takes place ordinarily in the state with which the child and the child's family have the closest connection and where significant evidence concerning the child's care, protection, training, and personal relationships is most readily available, and that courts of this State decline the exercise of jurisdiction when the child and the child's family have a closer connection with another state;

(4) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) Avoid re-litigation of custody decisions of other states in this State insofar as feasible;

(7) Facilitate the enforcement of custody decrees of other states;

(8) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this State and those of other states concerned with the same child; and

(9) Make uniform the law of those states which enact it.

(b) This Chapter shall be construed to promote the general purposes stated in this section. (1979, c. 110, s. 1.)

Editor's Note. — Session Laws 1979, c. 110, s. 14, makes the act effective July 1, 1979.

Session Laws 1979, c. 110, s. 2, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-2. Definitions.

As used in this Chapter:

(1) "Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) "Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(3) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings;

(4) "Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree;

(5) "Home state" means the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period;

(6) "Initial decree" means the first custody decree concerning a particular child;

(7) "Modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(9) "Physical custody" means actual possession and control of a child; and

(10) "State" means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia. (1979, c. 110, s. 1.)

§ 50A-3. Jurisdiction.

(a) A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Physical Presence. — It is a generally accepted principle that the courts of the state in which a minor child is physically present have jurisdiction consistent with due process to adjudicate a custody dispute involving that child. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212 (1981).

Custody Action Severable from Divorce Proceeding. — The portion of plaintiff's complaint seeking custody of his minor son constituted a separate action severable from his divorce proceeding so that dismissal of the divorce action for lack of subject matter jurisdiction did not result in a dismissal of the custody action, and the trial court was authorized to assert subject matter jurisdiction over the custody portion of the case where the child was physically within the State. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212 (1981).

§ 50A-4. Notice and opportunity to be heard.

Before making a decree under this Chapter reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. (1979, c. 110, s. 1.)

§ 50A-5. Service of notice.

The notice required by G.S. 50A-4 shall be given in a manner reasonably calculated to give actual notice and shall be served in the same manner as the manner of service of process set out in G.S. 1A-1, Rule 4. Proof of the service of the notice required by G.S. 50A-4 shall be made in the same manner as the manner to prove the service of process set out in G.S. 1A-1, Rule 4. (1979, c. 110, s. 1.)

§ 50A-6. Simultaneous proceedings in other states.

(a) If at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Chapter, a court of this State shall not exercise its jurisdiction under this Chapter, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under G.S. 50A-9 and shall consult the child custody registry established under G.S. 50A-16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with G.S. 50A-19 through G.S. 50A-22. If a court of this State has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-7. Inconvenient forum.

(a) A court which has jurisdiction under this Chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) If another state is or recently was the child's home state;
(2) If another state has a closer connection with the child and the child's family or with the child and one or more of the contestants;
(3) If substantial evidence relevant to the child's present or future care, protection, training, and personal relationships is more readily available in another state;
(4) If the parties have agreed on another forum which is no less appropriate; and
(5) If the exercise of jurisdiction by a court of this State would contravene any of the purposes stated in G.S. 50A-1.

(d) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(e) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate such party's consent and submission to the jurisdiction of the other forum.

(f) The court may decline to exercise its jurisdiction under this Chapter if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(g) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this State, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(h) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(i) Any communication received from another state informing this State of a finding of inconvenient forum because a court of this State is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this State shall inform the original court of this fact. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-8. Jurisdiction declined by reason of conduct.

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-9. Information under oath to be submitted to the court.

(a) Every party in a custody proceeding in such party's first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) Such party has participated as a party, witness, or in any other capacity in any other litigation concerning the custody of the same child in this or any other state;
(2) Such party has information of any custody proceeding concerning the child pending in a court of this or any other state; and
(3) Such party knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(b) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which such party obtained information during this proceeding. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-10. Additional parties.

If the court learns from information furnished by the parties pursuant to G.S. 50A-9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of such person's joinder as a party. Such person shall be served with process or otherwise notified in accordance with G.S. 50A-5. (1979, c. 110, s. 1.)

§ 50A-11. Appearance of parties and the child.

(a) The court may order any party to the proceeding to appear personally before the court. If that party has physical custody of the child, the court may order that such party appear personally with the child.

(b) The court may order that the notice given under G.S. 50A-5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(c) If a party to the proceeding who is outside this State is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances. (1979, c. 110, s. 1.)

§ 50A-12. Binding force and res judicata effect of custody decree.

A custody decree rendered by a court of this State which has jurisdiction under G.S. 50A-3 binds all parties who have been served or notified in accordance with G.S. 50A-5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those parties, the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Chapter. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-13. Recognition of out-of-state custody decrees.

The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Chapter or which was made under factual circumstances meeting the jurisdictional standards of this Chapter, so long as that decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Chapter. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-14. Modification of custody decree of another state.

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Chapter or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and G.S. 50A-8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with G.S. 50A-22. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-15. Filing and enforcement of custody decree of another state.

(a) An exemplified copy of a custody decree of another state may be filed in the office of the clerk of any superior court of this State. The clerk shall treat the decree in the same manner as a custody decree of a court of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.

(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this State may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or such party's witnesses. (1979, c. 110, s. 1.)

§ 50A-16. Registry of out-of-state custody decrees and proceedings.

The clerk of each superior court shall maintain a registry in which he shall enter the following:

(1) Exemplified copies of custody decrees of other states received for filing;
(2) Communications as to the pendency of custody proceedings in other states;
(3) Communications concerning a finding of inconvenient forum by a court of another state; and

(4) Other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this State or the disposition to be made by it in a custody proceeding. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-17. Certified copies of custody decree.

The clerk of a superior court of this State, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person. (1979, c. 110, s. 1.)

§ 50A-18. Taking testimony in another state.

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken. (1979, c. 110, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50A-19. Hearings and studies in another state; orders to appear.

(a) A court of this State may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state; and to forward to the court of this State certified copies of the transcript of the record of the hearing, and the evidence otherwise adduced. The cost of the services may be assessed against the parties in the discretion of the court.

(b) A court of this State may request the appropriate court of another state to order a person notified under the provisions of G.S. 50A-4 in a custody proceeding pending in the court of this State to appear in the proceedings, and if that person has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid. (1979, c. 110, s. 1.)

§ 50A-20. Assistance to courts of other states.

(a) Upon request of the court of another state the courts of this State which are authorized to hear custody matters may order a person in this State to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this State or may order social studies to be made for use in a custody proceeding in another state. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced and any social studies prepared shall be forwarded by the clerk of the court to the requesting court.

(b) A person within this State may voluntarily give testimony or a statement in this State for use in a custody proceeding outside this State.

(c) Upon request of the court of another state a competent court of this State may order a person in this State to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that state travel and other necessary expenses will be advanced or reimbursed. (1979, c. 110, s. 1.)

§ 50A-21. Preservation of documents for use in other states.

In any custody proceeding in this State the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, and other pertinent documents until the child reaches 18 years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents. (1979, c. 110, s. 1.)

§ 50A-22. Request for court records of another state.

If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this State, the court of this State upon taking jurisdiction of the case may request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in G.S. 50A-21. (1979, c. 110, s. 1.)

§ 50A-23. International application.

The general policies of this Chapter extend to the international area. The provisions of this Chapter relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons. (1979, c. 110, s. 1.)

§ 50A-24. Short title.

This Chapter may be cited as the "Uniform Child Custody Jurisdiction Act." (1979, c. 110, s. 1.)

§ 50A-25. Emergency orders.

Nothing in this Chapter shall be interpreted to limit the authority of the court to issue an interlocutory order under the provisions of G.S. 50-13.5(d)(2); or an immediate custody order under the provisions of G.S. 7A-284. (1979, c. 110, s. 1.)

Editor's Note. — G.S. 7A-284, referred to in this section, was repealed by Session Laws 1979, c. 815, s. 1, effective Jan. 1, 1980. As to the North Carolina Juvenile Code, see §§ 7A-516 through 7A-732.

Chapter 50B.

Domestic Violence.

Sec.
50B-1. Domestic violence; definition.
50B-2. Institution of civil action; motion for emergency relief; temporary orders.
50B-3. Relief.
50B-4. Enforcement of orders.

Sec.
50B-5. Emergency assistance.
50B-6. Construction of Chapter.
50B-7. Remedies not exclusive.
50B-8. Effect upon prosecution for violation of § 14-184 or other offense against public morals.

§ 50B-1. Domestic violence; definition.

Domestic violence means the occurrence of one or more of the following acts between past or present spouses or between persons of the opposite sex who are living together or have lived together as if married:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing another person in fear of imminent serious bodily injury by the threat of force. (1979, c. 561, s. 1.)

Editor's Note. — Session Laws 1979, c. 561, s. 8, provides: "This act shall become effective October 1, 1979, and shall apply to all occurrences involving the acts enumerated above occurring on or after that date."

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50B-2. Institution of civil action; motion for emergency relief; temporary orders.

(a) A party residing in this State may seek relief under this Chapter by filing a civil action alleging acts of domestic violence. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter.

(b) A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself. A hearing shall be held within 10 days of the filing of the motion.

(c) Prior to the hearing and upon a finding of good cause, the court shall enter such temporary orders as it deems necessary to protect the victim or minor children from acts of domestic violence. Immediate and present danger of such acts against the victim or minor children shall constitute good cause. (1979, c. 561, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50B-3. Relief.

(a) The court may grant any protective order or approve any consent agreement to bring about a cessation of acts of domestic violence. The orders or agreements may:

(1) Direct a party to refrain from such acts;

(2) Grant to a spouse possession of the residence or household of the parties and exclude the other spouse from the residence or household;

(3) Require a party to provide a spouse and his or her children suitable alternate housing;

(4) Award temporary custody of minor children and establish temporary visitation rights;
(5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it;
(6) Order either party to make payments for the support of a minor child as required by law;
(7) Order either party to make payments for the support of a spouse as required by law;
(8) Provide for possession of personal property of the parties;
(9) Order a party to refrain from harassing or interfering with the other; and
(10) Award costs and attorney's fees to either party.

(b) Protective orders entered or consent orders approved pursuant to this Chapter shall be for a fixed period of time not to exceed one year.

(c) A copy of any order entered and filed under this Article shall be issued to each party. In addition, a copy of the order shall be issued to and retained by the police department of the city of the victim's residence. If the victim does not reside in a city, or resides in a city with no police department, the copy shall be issued to and retained by the sheriff of the county in which the victim resides. (1979, c. 561, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50B-4. Enforcement of orders.

(a) A party may file a motion for contempt for violation of any order entered pursuant to this Chapter.

(b) A law enforcement officer shall arrest and take a person into custody if the officer has probable cause to believe that the person has violated a court order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from harassing or interfering with the victim, and if the victim presents the law enforcement officer with a copy of the order or the officer determines that such an order exists through phone, radio or other communication with appropriate authorities. The person arrested shall be brought before the appropriate district court judge at the earliest time possible to show cause why he or she should not be held in civil contempt for violation of the order. The person arrested shall be entitled to be released under the provisions of Article 26, Bail, of Chapter 15A of the General Statutes. (1979, c. 561, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50B-5. Emergency assistance.

(a) A person who alleges that he or she has been the victim of domestic violence may request the assistance of a local law enforcement agency. The local law enforcement agency shall respond to the request for assistance as soon as practicable; provided, however, a local law enforcement agency shall not be required to respond in instances of multiple complaints from the same complainant if the multiple complaints are made within a 48-hour period and the local law enforcement agency has reasonable cause to believe that immediate assistance is not needed. The local law enforcement officer responding to the request for assistance is authorized to take whatever steps are reasonably necessary to protect the complainant from harm and is authorized to advise the complainant of sources of shelter, medical care, counseling and other services. Upon request by the complainant and where feasible, the law enforcement officer is authorized to transport the complainant to appropriate facilities such as hospitals, magistrates' offices, or public or private facilities for shelter and accompany the complainant to his or her residence, within the jurisdiction in which the request for assistance was made, so that the complainant may remove food, clothing, medication and such other personal property as is reasonably necessary to enable the complainant and any minor children who are presently in the care of the complainant to remain elsewhere pending further proceedings.

(b) In providing the assistance authorized by subsection (a), no officer may be held criminally or civilly liable on account of reasonable measures taken under authority of subsection (a). (1979, c. 561, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 50B-6. Construction of Chapter.

This Chapter shall not be construed as granting a status to any person for any purpose other than those expressly stated herein. (1979, c. 561, s. 1.)

§ 50B-7. Remedies not exclusive.

The remedies provided by this Chapter are not exclusive but are additional to remedies provided under Chapter 50 and elsewhere in the General Statutes. (1979, c. 561, s. 1.)

§ 50B-8. Effect upon prosecution for violation of § 14-184 or other offense against public morals.

The granting of a protective order, approval of a consent agreement, prosecution for violation of this Chapter, or the granting of any other relief or the institution of any other enforcement proceedings under this Chapter shall not be construed to afford a defense to any person or persons charged with fornication and adultery under G.S. 14-184 or charged with any other offense against the public morals; and prosecution, conviction, or prosecution and conviction for violation of any provision of this Chapter shall not be a bar to prosecution for violation of G.S. 14-184 or of any other statute defining an offense or offenses against the public morals. (1979, c. 561, s. 7.)

Cross References. — For similar provision applicable to domestic criminal trespass, see § 14-134.3.

Chapter 51.

Marriage.

Article 1.

General Provisions.

Sec.
51-1. Requisites of marriage; solemnization.
51-1.1. Certain marriages performed by ministers of Universal Life Church validated.
51-3. Want of capacity; void and voidable marriages.
51-3.1. Interracial marriages validated.

Article 2.

Marriage Licenses.

Sec.
51-6. Solemnization without license unlawful.
51-9. Health certificates required of applicants for licenses.
51-18. Record of licenses and returns; originals filed.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.

The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a magistrate, and the consequent declaration by such minister or officer that such persons are husband and wife, shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this Chapter: Provided further, that marriages solemnized and witnessed by a local spiritual assembly of the Baha'is, according to the usage of their religious community, shall be valid; provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C. S., s. 2493; 1945, c. 839; 1965, c. 152; 1971, c. 1185, s. 26; 1977, c. 592, s. 1.)

Effect of Amendments. — The 1977 amendment substituted "husband and wife" for "man and wife" near the middle of the section.

Legal Periodicals. — For article, "An Evolutionary Consideration of the Marriage Formalities of Licensure and Solemnization in Contemporary English and North Carolinian Statutory Law," see 10 N.C. Cent. L.J. 1 (1978).

For note on constitutional law and illegitimate's paternal inheritance rights, see 16 Wake Forest L. Rev. 205 (1980).

CASE NOTES

There is no such thing as marriage, etc. —
In accord with original. See State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

Essentials of Section Must Be Followed. —
In accord with original. See State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

A valid marriage must be solemnized in the presence of one of three persons: (1) an ordained minister of any religious denomination; (2) a minister authorized by his church; or (3) a magistrate. State v. Lynch, 46 N.C. App. 608, 265 S.E.2d 491, rev'd on other grounds, 301 N.C. 479, 272 S.E.2d 349 (1980).

Instructions Defining "Church" and "Religious Denomination" Properly Refused. — In a bigamy prosecution in which the crucial determination was whether the person before whom a purported prior marriage of defendant was solemnized was an ordained minister of any religious denomination or a minister authorized by his church, the determination of whether there was a church or a religious denomination was not for the jury, since it was a matter of ecclesiastical law, and the trial court properly refused to give defendant's requested instructions defining "church" and "religious denomination." State v. Lynch, 46 N.C. App. 608, 265 S.E.2d 491, rev'd on other grounds, 301 N.C. 479, 272 S.E.2d 349 (1980).

Mail-Order Minister Not Qualified to Perform Valid Ceremony. — A ceremony solemnized by a Roman Catholic layman in the mail order business, who bought for $10.00 a mail order certificate giving him "credentials of minister" in the Universal Life Church, Inc., was not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in this State. State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

§ 51-1.1. Certain marriages performed by ministers of Universal Life Church validated.

Any marriages performed by ministers of the Universal Life Church prior to July 3, 1981, are validated, unless they have been invalidated by a court of competent jurisdiction, provided that all other requirements of law have been met and the marriages would have been valid if performed by an official authorized by law to perform wedding ceremonies. (1981, c. 797.)

§ 51-3. Want of capacity; void and voidable marriages.

All marriages between any two persons nearer of kin than first cousins, or between double first cousins, or between a male person under 16 years of age and any female, or between a female person under 16 years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or between persons either of whom is at the time incapable of contracting from want of will or understanding, shall be void. No marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section except for bigamy. No marriage by persons either of whom may be under 16 years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within 45 days of the marriage which separation has been continuous for a period of one year, shall be voidable unless a child shall have been born to the parties within 10 lunar months of the date of separation. (R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; Code, s. 1810; 1887, c. 245; Rev., s. 2083; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; C. S., s. 2495; 1947, c. 383, s. 3; 1949, c. 1022; 1953, c. 1105; 1961, c. 367; 1977, c. 107, s. 1.)

Effect of Amendments. — The 1977 amendment divided the former first sentence into the present first, second and third sentences by deleting "provided further, that" preceding the present second and third sentences, and in the present first sentence, deleted "a white person and a negro or between a white person and person of negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro, or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between" following "All marriages between" and "Provided, double first cousins may not marry; and" following "shall be void", inserted "or between double first cousins" and substituted "or between persons either of whom is at the time" for "or is." The amendment also deleted "for that one of the parties was a white person and the other a negro or of negro descent to the third generation, inclusive, and" preceding "for bigamy" in the present second sentence and substituted "unless a" for "Provided, that no" in the present fourth sentence.

CASE NOTES

Presumption of Validity of Second Marriage. — When two marriages of the same person are shown and both parties to the first marriage are living at the time of the second marriage, the second marriage is presumed to be valid and the first marriage dissolved by divorce. Parker v. Parker, 46 N.C. App. 254, 265 S.E.2d 237 (1980).

Collateral Attack. — A marriage between parties, either of whom has a living spouse at the time of the purported marriage, is void ab initio and such a marriage being a nullity, it may be attacked collaterally at any time, and no legal rights flow from it. Redfern v. Redfern, 49 N.C. App. 94, 270 S.E.2d 606 (1980).

Cited in Armstrong v. Armstrong, 41 N.C. App. 168, 254 S.E.2d 209 (1979).

§ 51-3.1. Interracial marriages validated.

All interracial marriages that were declared void by statute or a court of competent jurisdiction prior to March 24, 1977, are hereby validated. The parties to such interracial marriages are deemed to be lawfully married, provided that the provisions of this Chapter have been complied with. (1977, c. 107, s. 2.)

ARTICLE 2.

Marriage Licenses.

§ 51-6. Solemnization without license unlawful.

No minister or officer shall perform a ceremony of marriage between a man and woman, or shall declare them to be husband and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place or by his lawful deputy. There must be at least two witnesses to the marriage ceremony.

Whenever a man and woman have been lawfully married in accordance with the laws of the state in which the marriage ceremony took place, and said marriage was performed by a justice of the peace or some other civil official duly authorized to perform such ceremony, and the parties thereafter wish to confirm their marriage vows before an ordained minister or minister authorized by his church, nothing herein shall be deemed to prohibit such confirmation ceremony; provided, however, that such confirmation ceremony shall not be deemed in law to be a marriage ceremony, such confirmation ceremony shall in no way affect the validity or invalidity of the prior marriage ceremony performed by a civil official, no license for such confirmation ceremony shall be issued by a register of deeds, and no record of such confirmation ceremony may be kept by a register of deeds. (1871-2, c. 193, s. 4; Code, s. 1813; Rev., s. 2086; C. S., s. 2498; 1957, c. 1261; 1959, c. 338; 1967, c. 957, ss. 6, 9; 1977, c. 592, s. 2.)

Effect of Amendments. — The 1977 amendment substituted "a man and woman, or shall declare them to be husband and wife" for "any two persons, or shall declare them to be man and wife" in the first sentence of the first paragraph.

Legal Periodicals. — For article, "An Evolutionary Consideration of the Marriage Formalities of Licensure and Solemnization in Contemporary English and North Carolinian Statutory Law," see 10 N.C. Cent. L.J. 1 (1978).

CASE NOTES

Cited in State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

§ 51-7. Penalty for solemnizing without license.

CASE NOTES

Cited in In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976); State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

§ 51-8. License issued by register of deeds.

CASE NOTES

Cited in State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

§ 51-9. Health certificates required of applicants for licenses.

No license to marry shall be issued by the register of deeds of any county to a male or female applicant therefor except upon the following conditions: The said applicant shall present to the register of deeds a certificate executed within 30 days from the date of presentation showing that, by the usual methods of examination made by a regularly licensed physician, no evidence of any venereal disease was found.

Furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, no evidence of tuberculosis in the infectious or communicable stage was found.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be mentally competent. (1939, c. 314, s. 1; 1941, c. 218, s. 1; 1945, c. 577, s. 1; 1947, c. 929; 1955, c. 484; 1967, c. 137, s. 1; c. 957, s. 11; 1973, c. 476, s. 128; 1977, c. 428; 1979, c. 191; 1981, c. 674.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, added a former third paragraph, which read: "Furthermore, such certificate shall state that a rubella immunity test has been administered to the female applicant by a regularly licensed physician."

The 1979 amendment deleted the paragraph which had been added by the 1977 amendment.

The 1981 amendment, applicable to marriage licenses issued on or after June 24, 1981, deleted the former second, third and fourth sentences of the first paragraph, which required the health certificate to be accompanied by a report of a serological test for syphilis from a laboratory approved by the Commission for Health Services, and providing for approval of such laboratories by the Department of Human Resources.

CASE NOTES

Cited in State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

§ 51-10. Exceptions to § 51-9.

CASE NOTES

Cited in State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

§ 51-18. Record of licenses and returns; originals filed.

Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of . . . ., from the . . . . day of . . . . , 19 . . , to the . . . . day of . . . . , 19 . . , both inclusive.

In the book required by this section, each marriage license shall be indexed alphabetically according to the name of the proposed husband and the proposed wife. Each index entry shall include, but not be limited to, the full name of the intended husband and wife, the date the marriage ceremony was performed, and the location of the original license and the return thereon. The original license and return shall be filed and preserved. (1871-2, c. 193, s. 9; Code, s. 1818; 1899, c. 541, s. 3; Rev., s. 2091; C. S., s. 2504; 1963, c. 429; 1967, c. 957, s. 8; 1979, c. 636, s. 1.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote the last paragraph.

Session Laws 1979, c. 636, s. 2, provides: "This act shall become effective July 1, 1979, and shall apply to all marriage licenses issued on and after that date."

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.
52-1. Property of married persons secured.
52-2. Capacity to contract.
52-6. [Repealed.]
52-8. Validation of contracts failing to comply with provisions of former § 52-6.
52-9. Effect of absolute divorce decree on certificate failing to comply with § 52-6.
52-10. Contracts between husband and wife generally; releases.
52-10.1. Separation agreements.

§ 52-1. Property of married persons secured.

The real and personal property of any married person in this State, acquired before marriage or to which he or she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such married person and may be devised, bequeathed and conveyed by such married person subject to G.S. 50-20 and such other regulations and limitations as the General Assembly may prescribe. (Const., Art. X, s. 6; Rev., s. 2093; C. S., s. 2506; 1965, c. 878, s. 1; 1981, c. 815, s. 3.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "G.S. 50-20 and such other regulations and limitations as the General Assembly may prescribe" for "such regulations and limitations as the General Assembly may prescribe" at the end of the section.

Session Laws 1981, c. 815, s. 7, provides that the act shall apply only when the action for an absolute divorce is filed on or after October 1, 1981.

CASE NOTES

Presumption as to Property, etc. — Where the evidence showed that plaintiff wife provided all of $19,800 down payment for realty conveyed to her and her husband as tenants by the entirety, the presumption arose that she did not intend to make a gift to her husband of an entirety interest but that she intended that the husband would hold such an interest in trust for her, and this presumption of a resulting trust was not rebutted by evidence that both parties signed a note and deed of trust for the balance of the purchase price remaining after plaintiff's contribution. Tarkington v. Tarkington, 301 N.C. 502, 272 S.E.2d 99 (1980).

§ 52-2. Capacity to contract.

Subject to the provisions of G.S. 52-10 or 52-10.1, G.S. 39-7 and other regulations and limitations now or hereafter prescribed by the General Assembly, every married person is authorized to contract and deal so as to affect his or her real and personal property in the same manner and with the same effect as if he or she were unmarried. (1871-2, c. 193, s. 17; Code, s. 1826; Rev., s. 2094; 1911, c. 109; C. S., s. 2507; 1945, c. 73, s. 16; 1965, c. 878, s. 1; 1977, c. 375, s. 13.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "G.S. 52-10 or 52-10.1" for "G.S. 52-6" near the beginning of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Legal Periodicals. — For a note on the presumption of a wife's gratuitous services, see 16 Wake Forest L. Rev. 235 (1980).

CASE NOTES

III. LIABILITIES INCURRED.

The true relationship existing between the parties may be revealed to alter the otherwise absolute obligation of the signers. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

Where the wife executes a promissory note as a comaker, she is primarily liable thereunder. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

A comaker's right to contribution is unaffected by the marital relationship of the parties to a note. Grimes v. Grimes, 47 N.C. App. 353, 267 S.E.2d 372 (1980).

§ 52-4. Earnings and damages.

CASE NOTES

Cited in Nicholson v. Hugh Chatham Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

§ 52-5.1. Tort actions between husband and wife arising out of acts occurring outside State.

CASE NOTES

This section was designed by the legislature to enable a North Carolina resident to sue in the courts of this State, notwithstanding the rule that the law of the state wherein the injury occurred determines the right of the injured spouse to bring an action for damages. Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976).

The legislature, by the enactment of this section, rescinded the rule with reference to the right of a wife domiciled in North Carolina to maintain, in the courts of this State, an action for damages for injuries proximately caused by the negligence of her husband in another state. Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976).

This section left untouched the rule with reference to the right of a nonresident wife to sue her husband in the courts of North Carolina to recover damages for injuries inflicted in this State and proximately caused by his negligence. Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976).

§ 52-6: Repealed by Session Laws 1977, c. 375, s. 1, effective January 1, 1978.

Editor's Note. — Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

§ 52-8. Validation of contracts failing to comply with provisions of former § 52-6.

Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between January 1, 1930, and January 1, 1978, which does not comply with the requirement of a private examination of the wife or with the requirements that there be findings that such a contract between a husband and wife is not unreasonable or injurious to the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation. (1957, c. 1178; 1959, c. 1306; 1965, c. 207; c. 878, s. 1; 1967, c. 1183, s. 1; 1971, c. 101; 1973, c. 1387, s. 1; 1975, c. 495, s. 1; 1977, c. 375, s. 15; 1981, c. 599, s. 16.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "January 1, 1978" for "December 31, 1974" in the first sentence.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

The 1981 amendment, effective Oct. 1, 1981, inserted "or with the requirements that there be findings that such a contract between a husband and wife is not unreasonable or injurious to the wife" near the end of the first sentence.

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

Editor's Note. — Section 52-6, referred to in this section, was repealed by Session Laws 1977, c. 375, s. 1, effective January 1, 1978.

CASE NOTES

Use of Section to Validate Separation Agreement Precluded. — Where a wife's acknowledgment of a separation agreement was fatally defective under former § 52-6 because there was no private examination of the wife and thus no finding as to whether the agreement was unreasonable or injurious to the wife, and because the acknowledgment was certified by a Judge Advocate in the Marine Corps who did not qualify as a "certifying officer" under former § 52-6(c) since his position was not that of an "equivalent or corresponding officer" of the jurisdiction where the examination and acknowledgment were to be made, the omission of the private examination and the lack of authority on the part of the certifying officer precluded the use of curative statutes, this section and § 47-81.2, to validate the agreement. DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

Quoted in Spencer v. Spencer, 430 F. Supp. 683 (M.D.N.C. 1977).

Cited in Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Tarkington v. Tarkington, 45 N.C. App. 476, 263 S.E.2d 294 (1980).

§ 52-9. Effect of absolute divorce decree on certificate failing to comply with § 52-6.

Whenever it appears that, since the execution of a contract between a husband and wife in which the certificate of acknowledgment thereof fails to comply with the requirements of G.S. 52-6, a valid decree of absolute divorce between said husband and wife has been rendered, no action shall be maintained by her or anyone claiming under her for the recovery of the possession of, or to establish title to any interest in any property described in such contract unless such action is commenced within seven years after such decree of absolute divorce has become final or unless such action is commenced before January 1, 1978, whichever date is earlier. (1957, c. 1260; 1965, c. 878, s. 1; 1977, c. 375, s. 14.)

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, substituted "January 1, 1978, whichever date is earlier" for "May 1, 1958, whichever date is later" at the end of the section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Editor's Note. —

Section 52-6, referred to in this section, was repealed by Session Laws 1977, c. 375, s. 1, effective January 1, 1978.

§ 52-10. Contracts between husband and wife generally; releases.

(a) Contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer.

(b) Such certifying officer shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made. Such officer must not be a party to the contract.

(c) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a contract or release between such husband and wife. (1871-2, c. 193, s. 28; Code, s. 1836; Rev., s. 2108; C. S., s. 2516; 1959, c. 879, s. 12; 1965, c. 878, s. 1; 1977, c. 375, s. 2.)

Cross References. — As to distribution by court of marital property upon divorce, see § 50-20.

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, designated the former provisions of this section as subsection (a), deleted "not forbidden by G.S. 52-6 and" following "husband and wife" and "subject to G.S. 52-6, any" preceding "married persons" in the first sentence of present subsection (a), added the second sentence of present subsection (a), and added subsections (b) and (c).

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Legal Periodicals. — For an article dealing with marriage contracts as related to North Carolina law, see 13 Wake Forest L. Rev. 85 (1977).

CASE NOTES

Cited in Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978).

§ 52-10.1. Separation agreements.

Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer must not be a party to the contract. This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a separation agreement between such husband and wife. (1965, c. 803; 1977, c. 375, s. 3.)

Cross References. — As to distribution by court of marital property upon divorce, see § 50-20.

Effect of Amendments. — The 1977 amendment, effective Jan. 1, 1978, rewrote this section.

Session Laws 1977, c. 375, s. 17, provides that no provision of this act shall affect pending litigation.

Legal Periodicals. — For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

For note on voiding separation agreements by isolated acts of sexual intercourse, see 16 Wake Forest L. Rev. 137 (1980).

CASE NOTES

A wife's acknowledgment of a separation agreement was fatally defective under former § 52-6 where there was no private examination of the wife and thus no finding as to whether the agreement was unreasonable or injurious to the wife, and where the acknowledgment was certified by a Judge Advocate in the Marine Corps who did not qualify as a "certifying officer" under former § 52-6(c) because his position was not that of an "equivalent or corresponding officer" of the jurisdiction where the examination and acknowledgment were to be made; and the omission of the private examination and the lack of authority on the part of the certifying officer precluded the use of curative statutes, §§ 52-8 and 47-81.2, to validate the agreement. DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

Breach of Separation Agreement. — Breach by the husband of a part of a separation agreement requiring him to pay the difference in the federal and state income tax that the wife was required to pay by virtue of being unable to make a deduction for attorney fees was not the breach of a personal contract provision which would allow recovery of special damages for mental anguish. Stanback v. Stanback, 37 N.C. App. 324, 246 S.E.2d 74, cert. granted, 295 N.C. 649, 248 S.E.2d 253 (1978), aff'd in part and rev'd in part, 297 N.C. 181, 254 S.E.2d 611 (1979).

Enforcement by Specific Performance. — A separation agreement that has not been incorporated into a divorce judgment may be equitably enforced by an order of specific performance. Harris v. Harris, 50 N.C. App. 305, 274 S.E.2d 489 (1981).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-1. Short title.

Legal Periodicals. — For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

A proceeding under this Chapter is a civil proceeding as in actions for alimony without divorce. Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976), affirmed 232 S.E.2d 687 (1977).

§ 52A-2. Purposes.

CASE NOTES

Quoted in Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

§ 52A-3. Definitions.

CASE NOTES

Applied in Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

§ 52A-4. Remedies additional to those now existing.

Legal Periodicals. — For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Chapter does not establish additional grounds for support. It provides additional means of enforcing support obligations. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

The doctrine of res judicata applies to civil actions brought under this Chapter. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

Applied in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 52A-5. Obligor present in State is bound.

CASE NOTES

Chapter does not establish additional grounds for support. It provides additional means of enforcing support obligations. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

§ 52A-8. What duties are applicable.

CASE NOTES

Chapter does not establish additional grounds for support. It provides additional means of enforcing support obligations. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

Cited in Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977).

§ 52A-8.1. Remedies of a county furnishing support.

CASE NOTES

Proper Party to Bring Action. — When an obligee in another state makes an assignment of her rights under this chapter to a subdivision of that state, that subdivision is a proper party to bring an action in this State. Frederick County ex rel. Ridgway v. Skinner, 48 N.C. App. 621, 269 S.E.2d 678 (1980).

§ 52A-8.2. Paternity.

CASE NOTES

In an action under this Chapter, paternity must be judicially determined to warrant relief. Smith v. Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

Prior criminal conviction of failure to support illegitimate children is not conclusive as to paternity in a subsequent civil action for support of the same children. In the subsequent civil action, the putative father is entitled to have the issue of paternity litigated. Smith v. Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

Effect of Foreign Adjudication of Paternity. — See Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977).

§ 52A-9. How duties of support are enforced.

CASE NOTES

Cited in Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976).

§ 52A-10. Contents of complaint for support.

CASE NOTES

Failure to Include Name of Employer and Amount of Earnings. — Where complaint contained the name, address and circumstances of the defendant, as well as allegations that the plaintiff was entitled to child support payments from the defendant, it was not made defective by its failure to contain the name of the defendant's employer or the amount of the defendant's earnings. County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 52A-10.1. Official to represent obligee; responding.

CASE NOTES

Applied in Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

§ 52A-11. Duty of initiating court.

CASE NOTES

Initiating Court Need Not Issue Summons. — This section does not require the initiating court to issue a summons. Frederick County ex rel. Ridgway v. Skinner, 48 N.C. App. 621, 269 S.E.2d 678 (1980).

§ 52A-12. Duty of the court of this State as responding state.

CASE NOTES

A proceeding under this Chapter, etc. — In accord with original. See Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976), aff'd, 292 N.C. 192, 232 S.E.2d 687 (1977); Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

An action for support of illegitimate children under this Chapter is a civil action. Smith v. Burden, 31 N.C. App. 145, 228 S.E.2d 662 (1976).

Right of Defendant to Blood Grouping Test and Jury Trial on Issue of Paternity. — A defendant is entitled in a proceeding under the Uniform Reciprocal Enforcement of Support Act to a blood grouping test pursuant to § 8-50.1 where the issue of paternity is raised and, upon timely motion, is entitled to have the jury pass on the issue of paternity. Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976), aff'd, 292 N.C. 192, 232 S.E.2d 687 (1977).

Actions under this Chapter are decided under same law as actions for alimony without divorce. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

A decree for the future payment of alimony or child support is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the United States Constitution unless by the law of the state in which the decree was rendered its enforcement is so completely within the discretion of the courts in that state that they may annul or modify the decree as to overdue and unsatisfied installments. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

The doctrine of res judicata applies to civil actions brought under this Chapter. Blake v. Blake, 34 N.C. App. 160, 237 S.E.2d 310 (1977).

§ 52A-13. Order of support.

CASE NOTES

Jurisdiction of Judge in Responding State. — The judge in the responding State of North Carolina has jurisdiction only to determine whether the defendant owed a duty of support to his children in the initiating state of Florida, and to enter an order requiring the defendant to furnish such support. Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

The judge in the responding state has no jurisdiction whatsoever to condition the support payments upon certain visitation privileges for the defendant with his children in the responding or initiating state. Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

The judge in the responding state has no authority to permit a discontinuance of the support payments upon a finding by him of an alleged violation of the condition of visitation privileges. Pifer v. Pifer, 31 N.C. App. 486, 229 S.E.2d 700 (1976).

§ 52A-19. Rules of evidence.

CASE NOTES

Applied in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 52A-21. Application of payments.

CASE NOTES

Intent as to Changed Circumstances. — The legislature apparently intended that its enactment of this section would provide authority to the courts of this State to apply the Uniform Reciprocal Enforcement of Support Act so as to provide for the support of a minor child independent of and without regard for any other support judgments or whether there had been a change of circumstances of either the child or its parents; therefore, it is not necessary that the complaint for child support contain allegations of facts constituting changed circumstances. County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

§ 52A-22. Effect of participation in proceeding.

CASE NOTES

This section should make it clear that the obligor may raise the defenses of lack of jurisdiction over his person or property at any proceeding on enforcement. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

§ 52A-25. Additional remedies.

OPINIONS OF ATTORNEY GENERAL

Foreign Support Orders Entered before Oct. 1, 1975. — The registration provisions of the North Carolina Uniform Reciprocal Enforcement of Support Act (§§ 52A-25 through 30) apply so as to allow enforcement in North Carolina of foreign state support orders entered prior to Oct. 1, 1975. See opinion of Attorney General to Honorable Larry T. Black, District Court Judge, 26th Judicial District, Aug. 28, 1979.

§ 52A-26. Registration.

CASE NOTES

Jurisdiction over the person or property of the obligor is unnecessary for registration of a foreign support order. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

§ 52A-29. Registration procedure; notice.

Legal Periodicals. — For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Registration and enforcement are entirely separate procedures under this chapter. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

Personal jurisdiction is unnecessary for mere registration of a foreign support order under this section, and language in a confirmation order purporting to find personal jurisdiction is superfluous and does not bind the defendant therein in the subsequent enforcement proceedings. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

The mere registration of a foreign support order presented by the obligee under this section is a ministerial duty of the clerk. By that act no court or agency of the State is purporting to exercise power over the obligor or his property. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

Registration under this section does not prejudice any rights of the obligor; it merely changes the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina under § 52A-30. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

§ 52A-30. Effect of registration; enforcement procedure.

CASE NOTES

This section establishes a two-step procedure: (1) registration of the order, and if required, a hearing on whether to vacate the registration or grant the "obligor" other relief; and (2) enforcement of the order. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

Registration and enforcement are entirely separate procedures under this chapter. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

Determinations Required in Proceedings to Enforce Order. — Once the foreign support order is treated as a support order issued by a North Carolina court the obligee or the obligor may request modifications in the order, and when the obligee attempts to enforce the order, the court must determine whether jurisdiction exists over the person or property of the obligor and what amount, if any, is in arrears. Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977).

In challenging a foreign judgment a defendant has the right to interpose proper defenses. He may defeat recovery by showing want of jurisdiction either as to the subject matter or as to the person of defendant; however, jurisdiction will be presumed until the contrary is shown. Fleming v. Fleming, 49 N.C. App. 345, 271 S.E.2d 584 (1980).

§ 52A-32. Interpretation of Chapter.

CASE NOTES

Applied in County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979).

STATE OF NORTH CAROLINA
Department of Justice
Raleigh, North Carolina

October 15, 1981

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1981 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

Rufus L. Edmisten
Attorney General of North Carolina

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